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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the abstention doctrines of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), or *Younger* v. *Harris*, 401 U.S. 37 (1971), can prevent a federal district court from adjudicating a claim that a federal statute (like the Federal Power Act) vests exclusive jurisdiction over certain matters in a federal agency (like FERC) and preempts a state utility commission from making its own separate determinations of those matters and preferring its state's interests to those of other states, contrary to the federal regulatory scheme?

STATEMENT REQUIRED BY RULE 28.1

Petitioners Kentucky Power Company, Appalachian Power Company, Columbus and Southern Ohio Electric Company, Indiana & Michigan Electric Company, Ohio Power Company, and AEP Generating Company are each subsidiaries of petitioner American Electric Power Company, Inc. American Electric Power Company, Inc. has no parent company. American Electric Power Company, Inc. has no other subsidiaries that are not wholly-owned.

PARTIES BELOW

The Plaintiffs-Appellants in the District Court and the Court of Appeals were: American Electric Power Company, Inc., Kentucky Power Company, Appalachian Power Company, Columbus and Southern Ohio Electric Company, Indiana & Michigan Electric Company, Ohio Power Company, and AEP Generating Company.

The Defendants-Appellees and the intervenors who supported them were: Kentucky Public Service Commission; Richard D. Heman, Chairman of the Kentucky Public Service Commission; Laura Murrell and Rush Dozier, Members of the Kentucky Public Service Commission; David L. Armstrong, Attorney General, Commonwealth of Kentucky; Air Products and Chemicals, Inc.; Armco Inc.; Ashland Oil, Inc.; Huntington Alloys, Inc.; Kentucky Electric Steel Company; Pickands Mather & Co.; John Henry Ward; Bert Diamond; Sada Crum; and Concerned Citizens of Martin County, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") 1a-12a) and the order denying FERC's and petitioners' motion to publish the opinion (App. 14a) are each unpublished. The opinion of the District Court (App. 15a-23a) is unpublished.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on March 24, 1986. App. 1a-12a. A timely petition for rehearing was denied on May 6, 1986. App. 13a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents a question that, over the past four years, has become one of the most widely litigated and widely controverted in the federal system: whether abstention principles prohibit a federal district court from adjudicating a claim that a federal statute (like the Federal Power Act) vests exclusive jurisdiction over certain matters in a federal regulatory agency (like the Federal Energy Regulatory Commission ("FERC")) and preempts a state utility commission from making its own determination. The Sixth Circuit's holding on this abstention issue squarely conflicts with the decisions of the Third, Fifth, Eighth, Ninth, Eleventh, and District of Columbia Circuits. Only one decision of the Fourth Circuit is consistent with the Sixth Circuit's holding in this case. Accordingly, eight circuits are involved in the conflict.

The importance of review of these questions is greatly accentuated because, late last term, this Court held that the Federal Power Act does preempt state regulatory commissions from exercising jurisdiction over matters covered by FERC wholesale rate schedules; at the same time, this Court's decision explicitly left a number of questions unanswered. *See Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676, 4681 (June 17, 1986). The conflict in the courts of appeals on the abstention issues is thus impeding the development of substantive federal law. This case demonstrates how the unresolved conflict can subvert the central purposes of the Federal Power Act by enhancing the ability of states to seek to prefer their parochial interests at the expense of their neighbors.

Factual Background. This case is typical of the many recent cases that have presented these federal abstention issues. A state utility commission (the Kentucky Public Service Commission) has refused to give effect to the governing FERC rate schedules in setting retail rates. Instead, it has sought to redetermine matters that petitioners claim to be subject to FERC's exclusive jurisdiction — the allocation of low-cost

power supplies and interstate transmission costs among affiliated utilities serving different states — and to force an interstate power pool to subsidize Kentucky's citizens. Petitioners, in turn, sought a federal court order that would prevent this interference with the federal regulatory scheme and protect the financial integrity of the interstate power pool — only to be met with a contention that a federal court may not adjudicate these federal claims.

Petitioners are five operating electric utilities that sell electricity to customers in seven different states (Kentucky, Virginia, Tennessee, West Virginia, Ohio, Indiana, and Michigan), their parent company (American Electric Power Company, Inc. ("AEP")), and an affiliate (AEP Generating Company). Kentucky Power Company is the AEP subsidiary that serves Kentucky.

Each of these AEP operating electric utilities has its own generating capacity. Their facilities, however, are interconnected by extra high voltage transmission lines to form the "AEP Power Pool." This pooling of power permits AEP companies to achieve economies of scale and to coordinate the construction and operation of generating and transmission facilities, enhance reliability, and assure that each operating company can supply power to its retail customers at lower unit costs. These power supply allocation and transmission arrangements are governed by contracts among the AEP member companies, each of which has been filed with, and accepted by, FERC as a rate schedule.

This case arose because the Kentucky Public Service Commission refused to give effect to FERC rate schedules in setting Kentucky Power's retail rates, in two respects.

First, Kentucky Power is subject to a Unit Power Agreement, which FERC accepted as a rate schedule and which became effective, subject to refund, on December 10, 1984. *See AEP Generating Co.*, 29 FERC (CCH) ¶ 61,002 (1984). This FERC rate schedule obligates Kentucky Power to purchase

15% of the output of a coal-fired plant ("Rockport Unit 1") that is jointly owned by petitioners AEP Generating Company and Indiana & Michigan Electric Company. Kentucky Power entered into this agreement because it had not added new capacity to the Power Pool since 1969, and its generating capacity has been insufficient for many years to meet the demand of Kentucky Power's customers and a prudent reserve.[1] While the power from recently-constructed plants like Rockport Unit 1 is unavoidably more expensive than the power from preexisting AEP company facilities (which were built when costs were lower), the Rockport Unit 1 power is far less expensive than is the power from plants of other utilities that came on line during this same period.[2]

The Kentucky Public Service Commission refused to recognize the costs incurred under the Unit Power Agreement in establishing Kentucky Power's retail revenue requirements and retail rates. Instead, the Kentucky Commission set rates "as if" Kentucky Power had purchased the required additional capacity from the AEP Power Pool at a cost of about $240 per kw (as opposed to the some $855 per kw capacity cost of the Rockport Unit 1 power). The Kentucky Commission justified its action

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[1] It is essential to the successful operation of the AEP Power Pool that each of the operating companies acquires additional generating capacity when it becomes clear that its customers' demand for power will chronically exceed that company's own generation. In Kentucky Power's view, Sections .5, .6 and 5.7(ii) of a second FERC rate schedule (the AEP System Interconnection Agreement) impose this obligation on each member company. *See* p. 5 n.3, *infra.*

[2] Rockport Unit 1 has capacity costs of about $855 per kilowatt (kw). The capacity costs of coal-fired generating units of other utilities that have come on line during this period have generally ranged from about $1,250 per kw to $1,500 per kw. The average embedded capacity charges for power from existing AEP plants is about $320 per kw. The average embedded capacity charges are lower because they reflect costs of electric generation facilities constructed during earlier periods when construction costs were substantially lower.

by (1) "construing" a second FERC rate schedule that applies to the AEP companies (the AEP System Interconnection Agreement) to give Kentucky Power the option of obtaining power from the pool and (2) finding that Kentucky Power had been "imprudent" in acquiring new capacity from Rockport Unit 1 instead of exercising its supposed "option" to continue to buy power from the pool. The Kentucky Commission took this action despite the fact that the Unit Power Agreement is the "filed rate" and that, in Kentucky Power's view, the System Interconnection Agreement had required Kentucky Power to enter into that Unit Power Agreement.[3] *See* p. 4 n.1, *supra*. In any event, FERC has exclusive jurisdiction to construe the System Interconnection Agreement and to allocate low-cost and higher-cost power supplies among the AEP companies.

The result of the Kentucky Commission's order is that Kentucky Power is obligated by the FERC rate schedule to incur $23 million in costs each year that now cannot be recouped through its retail rates. But these "trapped costs" (*see Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. at 4681) are not the only adverse consequences of the Kentucky order. The Kentucky Commission order is an attempt to use its

[3] Indeed, after the Kentucky Commission issued its order, Kentucky Power filed a petition with FERC seeking a declaratory ruling that confirms that Kentucky Power is required to obtain this alternative power source and does not have the option of chronically draining power away from the pool. FERC has exercised jurisdiction over this matter, in a proceeding in which the Kentucky Commission and other respondents are parties. *Kentucky Power Co.*, FERC Docket EL86-10-000. FERC has said that its decision on this issue will bind the state commissions. *AEP Generating Company*, 32 FERC (CCH) ¶61,364, at 61,821 (1985). A decision by FERC is expected shortly.

jurisdiction over retail rates to shift the relatively higher costs of Rockport Unit 1 power to customers in other states, contrary to FERC's jurisdiction. *Id.*[4]

Second, the Kentucky Commission also refused to give effect to the terms of a second FERC rate schedule: the AEP Transmission Agreement which reallocates the costs of the AEP extra-high voltage transmission lines among the AEP pool members based upon their relative demand on the system, instead of the geographical method which had previously applied. Under the Transmission Agreement, the transition to the new system of cost allocation is phased in over a five-year period. However, the Kentucky Commission refused to recognize the phased-in nature of the Agreement. This Commission's ruling will have the effect of creating an additional $24 million in "trapped costs" over the five years. A federal court has entered an injunction requiring another state utility commission to give full effect to this same AEP Transmission Agreement in setting retail rates. *See Appalachian Power Co.* v. *Public Service Comm'n of West Virginia*, 614 F. Supp. 64 (S.D.W. Va.) (preliminary injunction), *aff'd*, 770 F.2d 159 (4th Cir. 1985), *on remand*, 630 F. Supp. 656 (S.D.W. Va. 1986) (permanent injunction).

Proceedings in the Lower Courts. Petitioners filed this suit in federal district court on December 12, 1984, eight days after the Kentucky Commission entered its order and two days after the Unit Power Agreement became effective. Petitioners contended that both the Federal Power Act and the Commerce Clause required the Kentucky Commission to give effect to the

[4] Under the Kentucky order, Kentucky Power is assumed to be entitled to purchase power at a cost of about $240 per kw when the average embedded cost of capacity from the AEP companies is about $320 per kw and when member companies are adding new power to the pool at a cost of about $855 per kw. The Kentucky Commission pointed to no other source of power outside the AEP system available to Kentucky Power (and indeed there is none) which would cost less than the $855 per kw.

Unit Power Agreement and Transmission Agreement unless and until modified by FERC and to respect FERC's exclusive jurisdiction over these arrangements. Petitioners sought a preliminary injunction that would permit the immediate recovery of the $23 million in "trapped" annual Unit Power Costs and thereby preserve the financial stability of the AEP Power Pool and its members. In light of the urgent need for relief, petitioners requested, and the District Court granted, expedition on the motion for preliminary injunction, with a hearing occurring on December 18, 1984.

Less than one month later, on January 16, 1985, the District Court held that it had jurisdiction under 28 U.S.C. § 1331 and that the Johnson Act (28 U.S.C. § 1342) authorized this action (App. 18a-19a), but dismissed the complaint on two related abstention grounds. First, it noted that Kentucky Power had subsequently appealed the Kentucky Commission order to a Kentucky state court.[5] Because Kentucky Power could raise its federal claims in that then-ongoing state appeal, the District Court held that it was required to abstain under the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971). App. 19a-20a. Second, the District Court held that abstention was independently required by the doctrine of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), because the federal action could interfere with Kentucky's "overriding interest in regulating the retail rates charged by public utilities." App. 21a-23a.

A divided Sixth Circuit affirmed. First, the court held, with

[5] Because it had been unclear whether the District Court would assert jurisdiction over the matter, Kentucky Power filed a petition in the Kentucky state court for review of the Kentucky Commission order, on December 20, 1984, eight days after the federal suit was filed. Kentucky law requires such appeals to be filed within 20 days of the final commission order. This state proceeding is limited to the administrative record, and the six other AEP company petitioners are not parties to this state appeal.

Judge DeMascio disagreeing (App. 10a-12a), that the doctrine of *Younger* v. *Harris* required abstention. App. 6a-7a. Second, while the *per curiam* decision stated that abstention is not required by *Burford* (App. 4a-6a), two of the three judges on the panel separately stated that *Burford*, too, required abstention. App. 7a-10a & 10a-12a. Thus, the Sixth Circuit voted two to one in favor of abstention on each theory.

REASONS FOR GRANTING THE WRIT

The question whether abstention principles deprive federal district courts of authority to prevent state utility commissions from interfering with the exclusive jurisdiction of FERC (or other federal agencies) has become one of the most important and frequently recurring questions facing the federal judiciary. When the question was presented to the Court three terms ago in *Aluminum Company of America* v. *Utilities Comm'n of North Carolina*, 713 F.2d 1024 (4th Cir. 1983) ("*Alcoa*"),[6] only the Fourth Circuit had squarely addressed this issue. This Court denied Alcoa's petition for certiorari, with Justices Brennan and White noting that they would have granted the petition. 465 U.S. 1052 (1984). In the intervening three years, litigation of these questions has exploded. Four circuits have addressed these abstention issues in cases presenting the same Federal Power Act (or Natural Gas Act)[7] preemption claims raised in

[6] There, Alcoa had sought to litigate in federal district court the identical factual and legal claims under the Federal Power Act that this Court subsequently decided in *Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676 (June 17, 1986).

[7] This Court has stated many times that the "relevant provisions of [the Natural Gas Act and the Federal Power Act] 'are in all material respects substantially identical' " and that it is the Court's "established practice" to "cit[e] interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (citations omitted).

this case and in *Alcoa.*[8] In addition, other circuits have since addressed the issues in other closely related contexts.[9] The Sixth Circuit's abstention decision conflicts with each of these intervening court of appeals' decisions, as well as with the pertinent decisions of this Court. Ironically, the only court of appeals' decision that agrees with the Sixth Circuit is the decision that the Sixth Circuit's *per curiam* opinion (App. 4a-6a) purports to *disagree* with: the Fourth Circuit decision in *Alcoa.* Thus in three years, the conflict has spread to eight circuits, with six favoring the petitioners' view, and two opposed.

1. This Court's holdings reject the Sixth Circuit's ruling in this case. This Court has held that a federal court may not exercise "judicial discretion to dismiss a suit merely because a State court could entertain it" and that a federal court can abstain from "adjudicat[ing] a controversy properly before it . . . only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 813-14 (1976).

This Court's holdings teach that state courts simply cannot have an overriding interest in adjudicating the question whether Congress has conferred exclusive jurisdiction over certain mat-

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[8] *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111 (3rd Cir. 1986) (Natural Gas Act); *New Orleans Public Service, Inc.* v. *New Orleans,* 782 F.2d 1236 (5th Cir. 1986) (Federal Power Act); *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n,* 772 F.2d 404 (8th Cir. 1985) (Federal Power Act); *Appalachian Power Co.* v. *Public Service Comm'n of West Virginia,* 770 F.2d 159 (4th Cir. 1985), *affirming* 614 F.Supp. 64 (S.D.W. Va.) (Federal Power Act).

[9] *South Central Bell Tel. Co.* v. *Louisiana Pub. Service Comm'n,* 744 F.2d 1107, 1123 (5th Cir. 1984), *vacated on other grounds,* 54 U.S.L.W. 4505 (May 27, 1986); *Champion Int'l Corp.* v. *Brown,* 731 F.2d 1406 (9th Cir. 1984); *Family Division Trial Lawyers* v. *Moultrie,* 725 F.2d 695 (D.C. Cir. 1984); *Baggett* v. *Dept. of Professional Regulation,* 717 F.2d 521 (11th Cir. 1983).

ters in a federal regulatory agency and has therefore preempted contrary state action. This Court has repeatedly upheld the authority of federal courts to enjoin state utility commission action on the same basic preemption grounds presented here and rejected arguments that state remedies must be exhausted — without even addressing whether abstention was required or permitted. *See, e.g., Public Utilities Comm'n of California* v. *United States,* 355 U.S. 534, 540 (1958); *Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.,* 317 U.S. 456 (1943).

These principles apply with special force in cases presenting federal preemption claims under the Federal Power Act. The Act establishes a federal tribunal (FERC) to referee disputes among states on how low-cost and high-cost electric power supplies are allocated among them. The purposes of the Act would be frustrated if individual states could act on their own incentives and disrupt the interstate supply of power by adopting allocations that prefer their interests to those of neighboring states, contrary to FERC's regulation. *See Nantahala Power & Light Co.* v. *Thornburg,* 54 U.S.L.W. 4676 (June 17, 1986); p. 9 n.8, *supra* (and cases cited). Unless federal district courts have jurisdiction to enforce the now-established federal rights under the filed rate doctrine, states can thwart the federal regulatory scheme and subvert interstate power supply arrangements adopted thereunder. Supreme Court review of final judgments of the highest courts in states cannot realistically provide effective relief — as FERC recognizes. *See* p. 15, *infra.*

For these same reasons, the Third, Fifth, Eighth, Ninth, Eleventh, and District of Columbia Circuits have rejected each of the separate grounds upon which the Sixth Circuit ordered abstention in this case.

2. Under the doctrine of *Younger* v. *Harris,* a federal district court cannot enjoin an ongoing state judicial or quasi-judicial enforcement proceeding that implicates important state

interests when there is an adequate opportunity in the state proceeding to raise the federal claim. *See Middlesex County Ethics Committee* v. *Garden State Bar Ass'n,* 457 U.S. 423 (1982). Other than the Sixth Circuit in this case and the Fourth Circuit in *Alcoa,* federal courts of appeals have uniformly held that there is no basis for *Younger* abstention in a case like the present one, for two related reasons.

First, other courts of appeals have held, contrary to the Sixth Circuit, that *Younger* is inapplicable where, as in this case, the federal plaintiff is not the defendant in a state criminal prosecution or civil enforcement proceeding and is not seeking to enjoin a state proceeding.[10] Here, a utility is merely prosecuting a parallel state rate proceeding and appeal that the utility itself initiated. As the Third Circuit recently held, "[t]o deny [utility claimants] access to a federal forum simply because of their pending state appeal would be at odds with a fundamental premise of our federal judicial system: that is, 'that where Congress has granted concurrent jurisdiction, a plaintiff is free to bring suit in both the state and federal forums for the same cause of action.'" *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1117 (3rd Cir. 1986) (citation omitted). *Accord, Colorado River Water Conservation District* v. *United States, supra,* 424 U.S. at 817.

Similarly, the District of Columbia Circuit reasons that there can be no *Younger* abstention when, as here, the state has not "brought the federal plaintiffs before its own courts to protect important policy and resource interests" and when, as here, the federal plaintiff has not sought to "divert or circumvent state court adjudication." *Family Division Trial Lawyers* v.

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[10] This Court's recent decision in *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.,* 54 U.S.L.W. 4860 (June 27, 1986), makes it explicit that *Younger* abstention was possible there only because it involved a suit to enjoin a state enforcement proceeding and because (in contrast to the present case) Congress had not conferred exclusive jurisdiction on a federal agency over the matters at issue in the state proceeding.

Moultrie, 725 F.2d 695, 702 (D.C. Cir. 1984). These considerations have special force here, because federal claims were raised in the state proceeding only because of uncertainty over the availability of the federal forum. *Compare* p. 7 n.5, *supra, with Kentucky West Virginia Gas Co., supra,* 791 F.2d at 1117.

Second, *Younger* abstention is proper only if the state proceeding implicates "important state interests." *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n, supra,* 457 U.S. at 432. Contrary to the Sixth Circuit holding, other courts of appeals hold that this state interest in regulating retail rates, however important, cannot give the state an "overriding interest" in adjudicating federal preemption claims that go to "the power of the state administrative agency to proceed at all;" "no deference is due state proceedings which would entrench upon the exclusive federal domain." *Baggett* v. *Department of Professional Regulation,* 717 F.2d 521, 524 (11th Cir. 1983).

Thus, three courts of appeals have now held that *Younger* abstention is improper in suits raising the precise Federal Power Act and Commerce Clause preemption claims at issue here. They reason that the "legitimate state interest contemplated by *Younger* ... does not exist when the state action has been preempted or foreclosed" by a federal statute, *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n,* 772 F.2d 404, 417 (8th Cir. 1985), and that the "notion of 'comity' embodied by the *Younger* doctrine is 'not strained when a federal court cuts off state proceedings that entrench upon the federal domain.' " *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1117 (3rd Cir. 1986) (citations omitted); *accord, Appalachian Power Co.* v. *Public Service Comm'n of West Virginia,* 614 F. Supp. 64, 70-71 (S.D. W. Va.)., *aff'd,* 770 F.2d 159 (4th Cir. 1985). *See also Champion Int'l Corp.* v. *Brown,* 731 F.2d 1406, 1409 (9th Cir. 1984).

3. The abstention doctrine of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), is an even narrower exception to the duty of federal courts to adjudicate claims properly before it. It applies only where "difficult questions of state law" are presented and "federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District* v. *United States, supra*, 424 U.S. at 814. Numerous courts of appeals have disagreed with the majority of the Sixth Circuit panel in this case and with the Fourth Circuit in *Alcoa*. They hold that *Burford* cannot permit abstention in a case like this one where *no* state law issues are presented and the only issue is whether federal law preempted the state agency from deciding a matter at all. The Third, Fifth, and Eighth Circuits have so held in cases presenting the very Federal Power Act (or Natural Gas Act) preemption claims at issue here.

These courts of appeals reason that when "Congress has created a statutory scheme . . . which arguably preempts the local regulation complained of," the federal preemption claim is "in no way dependent on local factors or local expertise for their resolution" and there is no basis for *Burford* abstention. *New Orleans Public Service, Inc.* v. *New Orleans*, 782 F.2d 1236, 1243 (5th Cir. 1986)(citations omitted);[11] *accord, Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n*, 791 F.2d 1111, 1115-16 (3rd Cir. 1986); *Middle*

[11] On June 10, 1986, four months after its decision in *New Orleans Public Service, Inc.* was announced, the Fifth Circuit, *sua sponte*, requested counsel in that case to submit letter briefs on the question whether its abstention ruling in that case should be vacated. This development further underscores the uncertainty in this area and the need for review by this Court.

South Energy, Inc. v. *Arkansas Public Service Comm'n,* 772 F.2d 404, 413 (8th Cir. 1985).[12]

Other courts have reached the identical results in cases arising under other federal statutes. *Baggett* v. *Department of Professional Regulation,* 717 F.2d 521, 524 (11th Cir. 1983); *South Central Bell Telephone Co.* v. *Louisiana Pub. Serv. Comm'n,* 744 F.2d 1107, 1123 (5th Cir. 1984), *vacated on other grounds,* 54 U.S.L.W. 4505 (May 27, 1986); *International Bhd. of Elec. Workers* v. *Public Service Comm'n,* 614 F.2d 206, 212 n.1 (9th Cir. 1980). They, too, hold that *Burford* abstention cannot be applied when there is a substantial federal preemption challenge to a state agency's jurisdiction.

The ultimate issue in this case is how the less expensive embedded costs and the more expensive Rockport Unit 1 costs are to be allocated among the affected companies and states. The Federal Power Act entitles petitioners to have that decision made by FERC rather than by one of the interested states and requires state commissions to give effect to filed rates. *Nantahala Power & Light Co.* v. *Thornburg, supra,* 54 U.S.L.W. 4676. Thus, the petitioners seek nothing more than their established rights under federal law. There is no state law issue. Neither this Court's precedents, common sense, nor deference to state courts where state law is involved, requires federal abstention in such a case. In any of at least six other circuits, the door of the federal courthouse would have been open to these petitioners. Such an important issue as the accessibility of federal courts to vindicate federal rights cannot depend on the fortuity of whether the supplicant and the courthouse are in Kentucky or Pennsylvania.

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[12] The Sixth Circuit's ruling is also inconsistent with the Johnson Act, 28 U.S.C. § 1342. Under the Sixth Circuit's holding, a federal court could never grant equitable relief in a federal challenge to a state order affecting rates. Yet the Johnson Act expressly authorizes such orders when the federal claim is based on Commerce Clause or federal preemption grounds. *Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.,* 317 U.S. 456 (1943).

4. The decision of these federal abstention issues by this Court at this time is a matter of the utmost importance. Indeed, FERC itself has recognized that federal court jurisdiction over challenges to state utility commission action under the filed rate doctrine is essential to the full implementation of the Federal Power Act. FERC participated in the court of appeals proceedings and successfully argued in favor of this position in both *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utilities Commission*, 791 F.2d 1111 (3rd Cir. 1986), and *New Orleans Public Service, Inc.* v. *New Orleans*, 782 F.2d 1236 (5th Cir. 1986). For these reasons, after the Sixth Circuit issued its decision in this case, FERC wrote the Sixth Circuit a letter, noted that this decision presented a possibly certworthy issue, and requested that the Sixth Circuit publish its opinion. However, the Sixth Circuit has refused to do so. App. 14a.

The Sixth Circuit's response to FERC represents a further reason for review. It subverts the rule of law for a court of appeals to fail to publish decisions in a major case of first impression in that circuit, especially when it conflicts with the decisions of other courts of appeals and when a federal agency has requested that the opinion be published because it is considering participation in the case at the Supreme Court stage. This case thus affords the Court a rare opportunity to indicate the appropriate publication policies of federal courts of appeals. In all events, a court of appeals cannot be permitted to avoid Supreme Court review by hiding conflict-creating decisions in unpublished opinions.[13]

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[13] This is not the first time that the Sixth Circuit has declined to publish an opinion where the issue was one of first impression and important. *See Antalek* v. *Norfolk and Western Ry. Co.*, No. 84-3057 (6th Cir., Aug. 30, 1984, unpublished opinion). On May 5, 1986, this Court granted certiorari in *Atchison, Topeka and Santa Fe Ry. Co.* v. *Buell*, No. 85-1140, to review the identical issue involved in *Antalek*.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 15, 1986

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APPENDIX

No. 85-5129

United States Court of Appeals

FOR THE SIXTH CIRCUIT

AMERICAN ELECTRIC POWER COMPANY, INC.; KENTUCKY POWER COMPANY; APPALACHIAN POWER COMPANY; COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY; INDIANA AND MICHIGAN ELECTRIC COMPANY; OHIO POWER COMPANY AND AEP GENERATING COMPANY,

Plaintiffs-Appellants,

v.

KENTUCKY PUBLIC SERVICE COMMISSION; RICHARD D. HEMAN, CHAIRMAN OF THE KY PUBLIC SERVICE COMMISSION; LAURA MURRELL, MEMBER OF THE KY PUBLIC COMMISSION; AND RUSH DOZIER, MEMBER OF THE KY PUBLIC SERVICE COMMISSION,

Defendants-Appellees,

AIR PRODUCTS AND CHEMICALS, INC., ARMCO, INC., ET AL. ATTORNEY GENERAL OF KENTUCKY, CONSUMER PROTECTION DIVISION, CONCERNED CITIZENS OF MARTIN COUNTY, INC., JOHN HENRY WARD, BERT DIAMOND AND SALLY CRUM,

Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BEFORE: **JONES** and **CONTIE**, Circuit Judges; and **DEMASCIO**, District Judge.*

Per Curiam. This case raises the question whether it is proper for a federal court to dismiss on abstention grounds a challenge to a state public utility commission rate order brought

* Honorable Robert E. DeMascio, United States District Judge for the Eastern District of Michigan, sitting by designation.

by a utility alleging federal law claims, when the utility has simultaneously brought an attack on the same order raising the same claims in state court. The court below elected to dismiss citing both the *Younger* and *Buford* [sic] abstention doctrines. *See Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil*, 319 U.S. 315 (1943). We hold that *Burford* abstention is inappropriate in this circumstance but that *Younger* abstention is permissible and, accordingly, affirm.

I

The primary controversy raised in the complaint involves the source from which an electric company will be permitted to purchase wholesale electricity and pass along the cost of that purchase to its customers through retail rates.[1] Plaintiffs-appellants are American Electric Power Company, Inc. ("AEP"), a multi-state holding company of electric power utilities, and its subsidiaries. Kentucky Power Company ("KPC"), one of AEP's subsidiaries, provides electricity to retail customers in Kentucky. KPC is party to an Interconnection Agreement among AEP affiliates. This agreement creates a pool of electricity and permits an Agreement member to draw from this pool when its own power needs exceed capacity. KPC had, for some time, been drawing heavily from this pool. According to KPC, it was therefore obliged by the Interconnection Agreement to find a new source of wholesale electricity. Consequently, in 1984, KPC entered into a second agreement (the "Unit Power Agreement [sic]) with two AEP subsidiaries under which KPC was permitted to purchase 15%

[1] AEP raised an addition [sic] claim in its complaint which involves reimbursements from AEP subsidiaries to KPC for the cost of construction and maintenance of a [sic] extra-high voltage line. The substance of this claim is unclear from the record and, regardless, its discussion would add nothing to the resolution of the issues on appeal.

of the output from a new generating plant being built in Rockport, Indiana.

Since the Unit Power Agreement was interstate in nature it was submitted to the Federal Energy Regulatory Commission (FERC) which accepted it as a rate schedule. FERC is empowered by the Federal Power Act, 16 U.S.C. § 791 *et. seq.* (1982), to determine the justness and reasonableness of interstate power transmission rates between utilities. The Unit Power Agreement was also submitted to the Kentucky Public Service Commission, the body which reviews Kentucky intrastate electric rates. The Kentucky Commission construed the Interconnection Agreement as permitting KPC to obtain all of its power needs from the pool without resort to the Unit Power Agreement. Since power under the new agreement would cost KPC more than three times that from the pool, the Kentucky Commission ruled that the purchases from the Unit Power Agreement would be imprudent and refused to approve the retail rate increase needed to pass on the higher costs.

In reviewing the fairness of intrastate retail rates, a state commission is bound to accept a FERC determination of the reasonableness of wholesale source rates. *Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (R.I. 1977), *cert. denied*, 435 U.S. 972 (1978). AEP and KCP argue that by not approving the higher retail rates the Kentucky Commission has illegally displaced or ignored the FERC approved Unit Power Agreement in violation of the Federal Power Act and the Supremacy Clause. Further, they claim that the Kentucky Commission was not permitted to construe the Interconnection Agreement because the regulation of interstate transmission is preempted by the Federal Power Act and the agreement, therefore, is subject to the sole jurisdiction of FERC. These are the claims that AEP and KPC had raised in federal court. Shortly after filing this complaint, KPC brought an action in Kentucky state court in which it appealed the Kentucky Commission's order and raised the same issues presented here. That action is still pending.

When the federal court below elected to abstain in favor of the state action and dismissed the case, the plaintiffs appealed.

II

Abstention from the exercise of legitimate federal jurisdiction should be the exception, not the rule. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813 (1976); *Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc.,* 720 F.2d 897, 901 (6th Cir. 1983). "Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River,* 424 U.S. at 813 (quoting *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188-189 (1959)). It is upon this background that we consider whether abstention was proper in this case. Our review of the trial court's decision to abstain is *de novo. Traughber v. Beauchane,* 760 F.2d 673, 676 (6th Cir. 1985).

A.

AEP argues that the court's reliance on *Burford* abstention in dismissing this case was inappropriate. We agree. Abstention was called for in *Burford v. Sun Oil,* 319 U.S. 315 (1943), because the federal court had been asked to review the reasonableness of a Texas Railroad Commission order, a question of state law which implicated the state's ability to develop a comprehensive policy regarding the placement of oil wells. *Id.* at 320-22; *Colorado River,* 424 U.S. at 814-15. The need for consistent and informed decisions in this area was evidenced by the state's assignment of the review of these decisions to one state court. *Burford,* 315 U.S. at 325. Under these circumstances, review of the state law question by the federal court risked upsetting the delicate balance among oil

producers that the state was attempting to establish in the harvesting of its oil deposits. *See id.* at 327.

Similarly, in *Ada-Cascade,* this court employed *Burford* abstention when it had been asked to determine "whether [a proposed waste] facility had obtained all the necessary state and local permits" to continue construction, an issue which required the interpretation of state acts and rules established as part of a complex system of environmental regulation. 720 F.2d at 901, 905.

By contrast, the court here is not asked to review the validity under state law of the Kentucky Commission order. Nor is the court asked to decide local issues. Rather, AEP claims that the Commission is prohibited from making the order as a matter of federal law. Although we recognize the presence here of a regulatory scheme with consolidated state review, a decision on the grounds raised here will not present the same risk of disruption that was present in *Burford.*

The court below relied primarily upon the Fourth Circuit decision in *Aluminum Co. of America v. Utilities Commission of North Carolina,* 713 F.2d 1024 (4th Cir. 1983), where that court of appeals applied *Burford* to abstain from deciding Alcoa's claim that a commission order interfered with a pre-emptive federal regulatory scheme and burdened interstate commerce. *Id.* at 1025. Despite the similarity to this case, we decline to follow the *Alcoa* decision. The court there failed to recognize that *Burford* operates only to prevent federal determination of *state* law. Rather, the court abstained because the claim attacked a state order and the determination of the federal issues raised would cause "needless obstruction of North Carolina's domestic policy." *Id.* at 1029. This is an overly broad application of the doctrine. The Supreme Court has refused to employ *Burford* in a similar context noting that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the

overturning of state policy." *Zablocki v. Redhail,* 434 U.S. 374, 379-80 n.5 (1978).

We hold that *Burford* abstention was improperly applied to this action where no questions of state law that implicate a complex state policy scheme are present.

B.

The doctrine developed in *Younger v. Harris,* 401 U.S. 37 (1971), and its progeny espouses "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 431 (1982). Abstention under *Younger* can be appropriate in civil cases where the state is a party as well as criminal cases when an ongoing state judicial proceeding implicates important state interests and provides an adequate opportunity to raise constitutional challenges. *Id.* at 432. When this is the case, the federal court should, absent bad faith, harassment or a patently invalid state statute, defer to certain state proceedings to consider the federal claims in the first instance. *See Colorado River,* 424 U.S. at 816.

There is little question here that the regulation of consumer electric rates is an important state interest or that KPC could raise its constitutional challenges to the Commission order in its state action. However, applying *Younger* here would be unusual in that the federal plaintiff is also, procedurally, a plaintiff in the pending state action. The typical *Younger* case involves a defendant to state initiated proceedings who prefers to raise his federal claims as a plaintiff in federal court than as a defense to the state court action. *Crawley v. Hamilton County Commissioners,* 744 F.2d 28, 30 (6th Cir. 1984). In *Crawley* state prisoners brought actions to challenge the conditions of their confinement in both state and federal court. This court

refused to apply *Younger* abstention precisely because the federal plaintiffs were also the state plaintiffs. *Id.*

Formal denominations of plaintiff and defendant should not be applied mechanically, however. In *Blue Cross & Blue Shield of Michigan v. Baerwaldt*, 726 F.2d 296, 299 (6th Cir. 1984), this court abstained under *Younger* where an insurance company raised constitutional challenges to a rate order both by bringing an action in federal court and by seeking review of the order in state court. The posture in *Blue Cross* was significantly different than that in *Crawley*. The state proceedings in *Crawley* began with a state court complaint filed by the federal plaintiff. In *Blue Cross*, and in this case, the proceedings began at the regulatory level and the subsequent court action was no more than an appeal of a state order entered against the party who appeals. *See Blue Cross*, 726 F.2d at 299. The process here was begun by the state in asserting its power to regulate intrastate commerce. When the regulatory activities of the state proceed to a state judicial forum, the principles of comity and federalism that underly the *Younger* doctrine come into play and the federal courts should abstain from interfering.

AEP does not deny that they will have an adequate opportunity to raise their federal claims in the pending state action, nor do they claim that the Kentucky Commission's orders are the result of bad faith or harassment. *See Middlesex County*, 457 U.S. at 437. Consequently we hold that the district court properly dismissed the complaint. The judgment of the court below is AFFIRMED.

CONTIE, Circuit Judge, concurring. I concur in the result and in the reasoning of the Court except for the holding that the district court improperly relied on *Burford* abstention in dismissing this case. I would hold that *Burford* abstention applies.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Supreme Court held that a district court should have abstained when presented with a suit seeking review of the reasonableness

under Texas state law of a state commission's permit to drill oil wells. Abstention was appropriate because "review of reasonableness by the federal courts . . . where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields." *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 815 (1976). Accordingly, even though review of a state law question was at issue in *Burford,* the Court focused on the disruption of a state policy in applying abstention.

This Court addressed and applied *Burford* abstention in *Ada-Cascade Watch Co. v. Cascade Resource Recovery,* 720 F.2d 897 (6th Cir. 1983), where we found that the Supreme Court had established two factors which justify *Burford* abstention. "First, the presence of a complex state regulatory scheme which would be disrupted by federal court review; and, secondly, the existence of a state-created forum with specialized competence in the particular area." *Id.* at 903.

The district court below found that the considerations highlighted in *Ada-Cascade* existed in the present case. The court initially observed that the first factor was satisfied since Kentucky "has an overriding interest in regulating the retail rates charged by public utilities." The court explained that the fixing of intrastate electricity rates by the Kentucky Commission undoubtedly involved fundamental state policy considerations. Also, the court noted that the rates are set by the Kentucky Commission "in accordance with statutory procedures enacted for their formulation and execution." The court further found that the second consideration was present since the orders of the Kentucky Commission are appealed to a "designated state-created forum with special expertise in the public utility regulation field." Exclusive judicial review is provided in the

Franklin County Circuit Court by K.R.S. 278.410(1).[1] Finding the factors listed in *Ada-Cascade* to be present, the district court held that abstention under *Burford* was required.

The district court's holding is consistent with the Fourth Circuit decision in *Aluminum Company of America v. Utilities Commission of North Carolina,* 713 F.2d 1024 (4th Cir. 1983), a case which was relied upon by the district court. The appeal in *Alcoa* involved an action which had been brought in federal court by a utility company and its parent, seeking to enjoin the enforcement of a rate order issued by the state utilities commission which allegedly interfered with the FERC's regulatory scheme. State court proceedings involving, among other issues, the same federal claims raised in the federal action were pending at the time of appeal. The Fourth Circuit held:

> We believe that the present case involves the quintessential *Burford* setting of a complex state regulatory scheme concerning important facts of state policies for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded. The usual rule of comity must govern; the district court properly exercised its discretionary power to withhold

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[1] The statute provides in pertinent part:

> Any party to a commission proceeding or any utility affected by an order of the Commission may, within twenty (20) days after being served with the order, or within twenty (20) days after its application for rehearing has been denied by failure of the Commission to act, or within twenty (20) days after being served with the final order on rehearing, when a rehearing has been granted, bring an action against the Commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable. Notice of the institution of such action shall be given to all parties of record before the Commission.

K.R.S. 278.410(1) (1981).

> relief so as to avoid needless obstruction of [the state's] domestic policy.

Id. at 1029.

The present case is factually indistinguishable from *Alcoa*. I would accordingly follow that court's analysis in this case and find that the present appeal "involves the quintessential *Burford* setting." Also, the conditions stated in *Ada-Cascade* are met in this case. First, there is a complex state regulatory scheme involving important state policies and second, Kentucky has provided a specialized forum to review challenges such as the one presented on appeal. Based on this court's prior discussion of *Burford* abstention and the holding of the *Alcoa* case, I would affirm the district court's application of *Burford* abstention.

DeMASCIO, District Judge, concurring. While I agree that the district court properly dismissed plaintiff's complaint, I reach that conclusion for the opposite reasons suggested in the per curiam opinion. I am convinced that the proper basis for abstention is *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and not *Younger v. Harris*, 401 U.S. 37 (1971).

In *Crawley v. Hamilton County Commissioner*, 744 F.2d 28 (6th Cir. 1984), this court circumscribed the application of the *Younger* doctrine. There, the district court dismissed, on *Younger* grounds, a § 1983 action brought by a group of jail inmates challenging the conditions of their confinement. The plaintiffs were contemporaneously pursuing a state court action on the same grounds. The circuit court reversed, holding the *Younger* doctrine inapplicable in this procedural context:

> *Younger* and its progeny all have a procedural posture which is very different from our case. In the typical *Younger* case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings. Moreover, the basis for the federal relief claimed is generally avail-

> able to the would-be federal plaintiff as a defense in the state proceedings. In our case, the federal plaintiffs are also *plaintiffs* in the state court action. In addition, the plaintiffs are not attempting to use federal courts to shield them from state court enforcement efforts. Accordingly, there is no basis for *Younger* abstention in this case.

Id. at 30 (citations omitted).

Noting that the Kentucky Power Company appealed the Kentucky Public Service Commission's December 4, 1984 order in state court, the lower court held that the *Younger* doctrine, made applicable to civil actions by virtue of *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423 (1982), made federal abstention proper. I disagree. The procedural posture of this case does not fit the *Younger* mold. Appellants are not attempting to enjoin state court proceedings against them, but rather they are state court plaintiffs. Further, appellants are not defensively asserting federal claims in the state court action. Therefore, the district court should not have abstained on the basis of the *Younger* doctrine and the per curiam opinion improperly affirms on that basis.

But, under the *Burford* doctrine, abstention is appropriate where federal review of a state law question would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *See Ada-Cascade Watch Co. v. Cascade Resource Recovery,* 720 F.2d 897, 903 (6th Cir. 1983).

The prerequisites for the application of *Burford* are: (a) the presence of a complex state regulatory scheme that would be disrupted by federal court review and (b) the existence of a state-created forum with specialized competence in the particular area. In *Alcoa v. Utilities Comm'n of N. Carolina,* 713 F.2d 1024 (4th Cir. 1983), the Fourth Circuit, faced with similar facts, concluded that *Burford* abstention was appropriate. The court held that the state commission's ratemaking "involved important and basic consideration of state policy and was

accomplished in accordance with the uniform statutory procedures for the formation of that policy." *Id.* at 1029.

In holding the *Burford* abstention appropriate, the district court stated:

> The Commonwealth of Kentucky clearly has an overriding interest in regulating the retail rates charged by public utilities. The Kentucky Public Service Commission orders outline the retail, intrastate rates to be charged to Kentucky electric power consumers. The setting of these rates undoubtedly involve fundamental state policy considerations and are accomplished in accordance with statutory procedures enacted for their formulation and execution. These orders are being appealed by Kentucky Power Company to a designated state-created forum with special expertise in the public utility regulation field; to wit, the Frankling [sic] County Circuit Court. Kentucky Power Company has raised both state and federal legal issues in that forum. These federal issues are the same ones the American Electric Power Co. affiliates wish this court to consider.

I agree that abstention on *Burford* grounds is appropriate in this case. The State of Kentucky certainly has a legitimate interest in the regulation of the retail rates of its public utilities. In order to effectively protect that interest the state regulatory commission has the power to scrutinize expenditures and costs that have been imprudently incurred by a utility when other less expensive means are available for the same purpose. Moreover, an extensive state appeliate system exists whereby utilities can seek review of the commission's orders. Not only does such a system exist, but appellants are taking advantage of that system while, at the same time, pursuing this action.

The district court's ruling should be affirmed because abstention based on *Burford* was proper.

No. 85-5129

United States Court of Appeals

FOR THE SIXTH CIRCUIT

AMERICAN ELECTRIC POWER CO., INC., ET AL.,
Plaintiffs-Appellants,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, ET AL.,
Defendants-Appellees,

ORDER

BEFORE: **JONES** and **CONTIE**, Circuit Judges, and **DeMASCIO*** United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for hearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

JOHN HEHMAN

John P. Hehman, *Clerk*

* Hon. Robert E. DeMascio sitting by designation from the Eastern District of Michigan

No. 85-5129

United States Court of Appeals

FOR THE SIXTH CIRCUIT

AMERICAN ELECTRIC POWER COMPANY, ET AL.,
Plaintiffs-Appellants,

vs.

KENTUCKY PUBLIC SERVICE, ET AL.,
Defendants-Appellees

AIR PRODUCTS AND CHEMICAL, INC., ARMCO, INC., ET AL.,
Intervenors-Appellees

ORDER

Upon consideration of the motions of J. M. Feit, Solicitor and the appellant to publish the Court's decision of March 24, 1986,

It is ORDERED that the motions be and they are hereby denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, *Clerk*

LEONARD GREEN
Leonard Green, *Chief Deputy*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

CIVIL ACTION NO. 84-83

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL — PLAINTIFFS

VS. — ORDER

KENTUCKY PUBLIC SERVICE COMMISSION, ET AL — DEFENDANTS

This matter is before the court on plaintiffs' motion for preliminary injunction and defendants' motion to dismiss for lack of subject matter jurisdiction and abstention.

FACTS

In order to meet electric power demand in Eastern Kentucky, plaintiff Kentucky Power Company entered into a Unit Power Agreement with its parent holding company, plaintiff American Electric Power Company, on August 1, 1984, whereby the parent would obtain fifty (50%) percent ownership interest in a newly-built electric power generating plant and the subsidiary would purchase, for up to 20 years, the power associated with fifteen (15%) percent of the plant. The agreement was filed with the Federal Energy Regulatory Commission as a conditional rate schedule on August 2, 1984. This action was undoubtedly taken in anticipation of defendant Kentucky Public Service Commission's refusal to approve Kentucky Power's previously filed application for a Certificate of Public Convenience and Necessity authorizing it to acquire outright 15% ownership interest in this new power generating facility. This denial was ultimately entered on August 2, 1984. The Unit Power Agreement was thereafter accepted by the Federal Energy Regulatory Commission as a rate schedule on

October 1, 1984, effective as of the commercial operation date of the new generating plant.

While the Certificate of Public Convenience and Necessity case was before the Kentucky Public Service Commission, the Kentucky Power Company filed an application for a rate increase with the Commission which sought to recoup the costs resulting from the proposed purchase of the 15% ownership interest. Following the Commission's denial of authorization of that interest, the Kentucky Power Company amended its application to include, as a valid operating expense, the cost of purchased electric power under the Unit Power Agreement from American Electric Power Company or its affiliates. Public hearings were held on October 8-11, 1984. On December 4, 1984, the Kentucky Public Service Commission issued an order which denied that part of the rate request which represented the difference between the lower costs for electric power contained in an existing Interconnection Agreement, which had been previously entered into between all American Electric Power affiliates, and the relatively higher power costs within the Unit Power Agreement. It is the operation of the Kentucky Public Service Commission's rate order, which denies to the Kentucky Power Company the full retail rate increase request, which is sought to be enjoined by the company and all of the plaintiff American Electric Power Company affiliates.

The American Electric Power Company affiliates have additionally entered into a Transmission Agreement effective April 1, 1984 for the sharing of all costs associated with their high voltage transmission facilities. This agreement constitutes a clear change of cost allocation procedure within the affiliated group and it is to be phased in over a five year period. On March 29, 1984, this Agreement was filed with the Federal Energy Regulatory Commission as a rate schedule and on August 22, 1984, the filing was accepted by that agency pending further hearings.

Kentucky Power Company is the owner of an extra high voltage transmission line that is currently under construction and which runs across Northern Kentucky. Pursuant to its order dated September 20, 1983, the Kentucky Public Service Commission conducted an investigation of this line. Hearings were held on January 10-12 and February 16, 1984. On August 3, 1984, that state agency issued an order which limited Kentucky Power Company's investment in the line, for rate-making purposes, to approximately $54 million and that all investment in excess of that amount will not be recovered from Kentucky ratepayers. The agency further ordered a five year phase-in period of this amount into the rate base. The Kentucky Power Company and the American Electric Power Company affiliates seek to likewise enjoin the operation of this rate order of the Kentucky Public Service Commission in light of the federally approved Transmission Agreement.

The Kentucky Power Company has filed suit in Franklin County Circuit Court on December 21, 1984, seeking reversal of the Kentucky Public Service Commission's orders with respect to the Unit Power Agreement and the Transmission Agreement. None of the American Electric Power Company affiliates have intervened in that action to date. The same federal legal theories which are being advanced before the state court by Kentucky Power Company to obtain revisal [sic] of the state agency's orders are likewise before this court by the affiliated group.

ISSUES

1. Pursuant to the Johnson Act, 28 U.S.C. § 1342, does this court have subject matter jurisdiction to adjudicate this controversy?

2. May this court validly utilize the *Younger* and/or *Burford* abstention doctrines to dismiss this litigation?

ANALYSIS

I. SUBJECT MATTER JURISDICTION.

Defendants contend that the Johnson Act, 28 U.S.C. § 1342, prevents this court from exercising subject matter jurisdiction over this controversy. The Johnson Act provides that:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State."

28 U.S.C. § 1342. This statute's purpose is "to prevent public utilities from going to federal district court to challenge state administrative orders or avoid state administrative and judicial proceedings." *California v. Grace Bretheren Church,* 457 U.S. 393, 409-10 n.22 (1982). *See generally,* 1A, Pt.2 Moore's *Federal Practice* ¶ 0.206 (2d ed. 1983 & 1984 Cum.Supp.). In order for the Johnson Act to deprive federal courts of subject matter jurisdiction, all four of its conditions must be satisfied. *South Central Bell Telephone Co. v. Public Service Commission of Kentucky,* 420 F.Supp. 376, 377 (E.D. Ky. 1976).

Plaintiffs contend that the Kentucky Public Service Commission has usurped powers, granted by Congress in the Federal Powers [sic] Act, 16 U.S.C. § 791, et seq., to the Federal Energy Regulatory Commission, with respect to inter-

state electric rates and transmission. The Act allegedly preempts the field and the state agency may not conduct its affairs in regulating interstate retail electric rates in a manner inconsistent with the Act. Thus, the preemption asserted herein is a statutory claim based on the Federal Power Act and does not rest solely on the Supremacy Clause of the U.S. Constitution, Article VI, cl.2.

The court holds that section (1) of the Johnson Act is not satisfied and therefore that Act does not operate to preclude an exercise of subject matter jurisdiction by this court over this controversy. Courts which have addressed the issue of whether a public utility's preemption claim is a constitutional challenge under 28 U.S.C. §1342(1) have held that, although a challenge to a rate order based on preemption may be regarded as constitutional for some purposes, it provides no basis for involving the Johnson Act to deprive the federal jurisdiction where a state agency's order is challenged as violative [sic] a specific federal statute. *Aluminum Company of America v. Utilities Commission of the State of North Carolina*, 713 F.2d 1024, 1027-28 (4th Cir. 1983); *International Brotherhood of Electrical Workers v. Public Service Commission of Nevada*, 614 F.2d 206, 209-211 (9th Cir. 1980); *New England Telephone and Telegraph Co. v. Public Utilities Comm. of Maine*, 565 F.Supp. 949, 952-53 (D. Maine 1983); *Beckenstein v. Hartford Electric Light Co.*, 479 F.Supp. 417, 420 n.1 (D. Conn. 1979). Since section (1) of §1342 has not been satisfied, the Johnson Act cannot be utilized to strip this court of jurisdiction over this matter. This court has jurisdiction under 28 U.S.C. §1331.

II. YOUNGER ABSTENTION.

As noted above, Kentucky Power Company has appealed the Kentucky Public Service Commission's final orders in the underlying rate cases to the Franklin County Circuit Court pursuant to KRS 278.410. The existence of this ongoing state proceeding strongly suggests that this court abstain under the

doctrine of *Younger v. Harris,* 401 U.S. 37 (1971), as made applicable to civil actions in *Middlesex County Ethics Committee v. Garden State Bar Ass'n.,* 457 U.S. 423 (1982).

> "The question in this case is threefold: *first,* (does the prescribed state forum to which plaintiffs are relegated) constitute an ongoing state judicial proceeding; *second,* do the proceedings implicate important state interests; and *third,* is there an adequate opportunity in the state proceedings to raise constitutional challenges."

Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423, 431-32 (1982). *Accord: Blue Cross and Blue Shield of Michigan v. Baerwaldt,* 726 F.2d 296, 299 (6th Cir. 1984); *Ada-Cascade Watch Co. v. Cascade Resource Recovery,* 720 F.2d 897, 902 (6th Cir. 1983).

Clearly there is an ongoing state judicial proceeding in the state courts with respect to this matter pursuant to KRS 278.410. Furthermore, the regulation of intrastate retail electric utility rates clearly involves important state interests. *Aluminum Company of America,* 713 F.2d at 1029. *See Blue Cross and Blue Shield,* 726 F.2d at 299 ("The regulation of insurance companies clearly involves important state interests."). Lastly, Kentucky statutes provide ample opportunity for Kentucky courts to review the state commission's retail ratemaking order and to adjudicate both constitutional and non-constitutional objections thereto. KRS 278.410 and 278.450. Plaintiffs have not satisfactorily demonstrated "bad faith, harassment or some other extraordinary circumstance that would make abstention inappropriate." *Blue Cross and Blue Shield,* 726 F.2d at 300, *quoting Middlesex,* 457 U.S. at 437. Therefore, this court shall abstain from considering constitutional challenges to the final retail rate orders approved by the Kentucky Public Service Commission and shall dismiss this action. *Id.*

Any interested entities, who are not parties to the state appeal, could in all likelihood intervene in the state proceedings. Ky. C.R. 24.

III. BURFORD ABSTENTION.

In addition to *Younger* abstention, *Burford*-type abstention also requires that this action be dismissed. In the decision of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the United States Supreme Court

> "upheld abstention where the 'exercise of federal review of the [state law] question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' *Colorado River Water Conservation District* [*v. United States,* 424 U.S. 800, 814 (1976)]. . . .
>
> The *Burford* abstention, however, is not appropriate 'merely because resolution of a federal question may result in the overturning of a state policy.' *Zablocki v. Redhail,* 434 U.S. 374, 380 n.5, 98 S.Ct. 673, 678 n.5, 54 L.Ed.2d 618 (1978); *Colorado River Conservation District,* 424 U.S. at 815-16, 96 S.Ct. at 1245-46. The State must exhibit an overriding interest in the subject matter. *BT Investment Managers, Inc.*[*v. Lewis,* 559 F.2d 950, 955 (5th Cir. 1977)]. Additionally, the state must centralize review in a forum with special competence. *See Nasser v. City of Homewood,* 671 F.2d 432, 440 (11th Cir. 1982). The key question is whether an erroneous federal court decision could impair the state's efforts to implement its policy. *Turf Paradise, Inc. v. Arizona Downs,* 670 F.2d 813, 820 (9th Cir.), *cert. denied,* 456 U.S. U.S. 1011, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982); *BT Investment Managers, Inc.,* 559 F.2d at 955."

Ada Cascade, 720 F.2d at 903-4. These conditions exist here.

The Commonwealth of Kentucky clearly has an overriding interest in regulating the retail rates charged by public utilities. The Kentucky Public Service Commission orders outline the retail, intrastate rates to be charged to Kentucky electric power consumers. The setting of these rates undoubtedly involve fundamental state policy considerations and are accomplished in accordance with statutory procedures enacted for their

formulation and execution. *Aluminum Co. of America,* 713 F.2d at 1029. See KRS Chapter 278. These orders are being appealed by Kentucky Power Company to a designated state-created forum with special expertise in the public utility regulation field; to wit, the Franklin County Circuit Court. KRS 278.410(1). Kentucky Power Company has raised both state and federal legal issues in that forum. Those federal issues are the same ones the American Electric Power Co. affiliates wish this court to consider.

> "... (T)he present case involves the quintessential *Burford* setting of a complex state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded. The usual rule of comity must govern; the district court properly exercised its discretionary power to withhold relief so as to avoid needless obstruction of (Kentucky's) domestic policy."

Aluminum Company of America, 713 F.2d at 1029. *But cf., International Brotherhood of Electrical Workers,* 614 F.2d at 211-12.

The fact that a preemption claim is raised by plaintiffs does not *per se* require this court to decline to abstain. *Aluminum Company of America,* 713 F.2d at 1029. There is no clear conflict with the Federal Power Act, 16 U.S.C. § 791, et seq., by the commission's orders challenged herein. The Kentucky Public Service Commission orders

> "... (set) only retail, intrastate rates, an important matter traditionally within the sole discretion of the states, and do not directly conflict with FERC's wholesale and interstate rate setting powers. Evaluation of the preemption claim would involve detailed factfinding concerning the indirect effects of the (public service commission) order(s) on the rates established by FERC, and the contracts filed with FERC. Where, as here, circumstances are otherwise appropriate for *Burford* abstention, the federal court need not engage in such factfinding as a prerequisite to abstention."

Id at 1030.

The court considers the decision of the U.S. Court of Appeals for the Sixth Circuit in *Ada Cascade* and *Blue Cross, supra,* to require abstention in this case.

Therefore, the court being advised,

IT IS ORDERED as follows:

1. That plaintiffs' motion for preliminary injunction be, and it is, hereby DENIED;

2. That defendants' motion to dismiss be, and it is, hereby GRANTED on the basis of both *Younger* and *Burford* abstention doctrines; and

3. That the complaint herein be, and is it [sic], hereby DISMISSED, with prejudice, at the cost of the plaintiff.

This 16th day of January, 1985.

/s/ WILLIAM O. BERTELSMAN

[William O. Bertelsman] JUDGE

No. 86-49

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,

Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, et al.,

Respondents.

BRIEF OF RESPONDENTS AIR PRODUCTS AND CHEMICALS, INC., ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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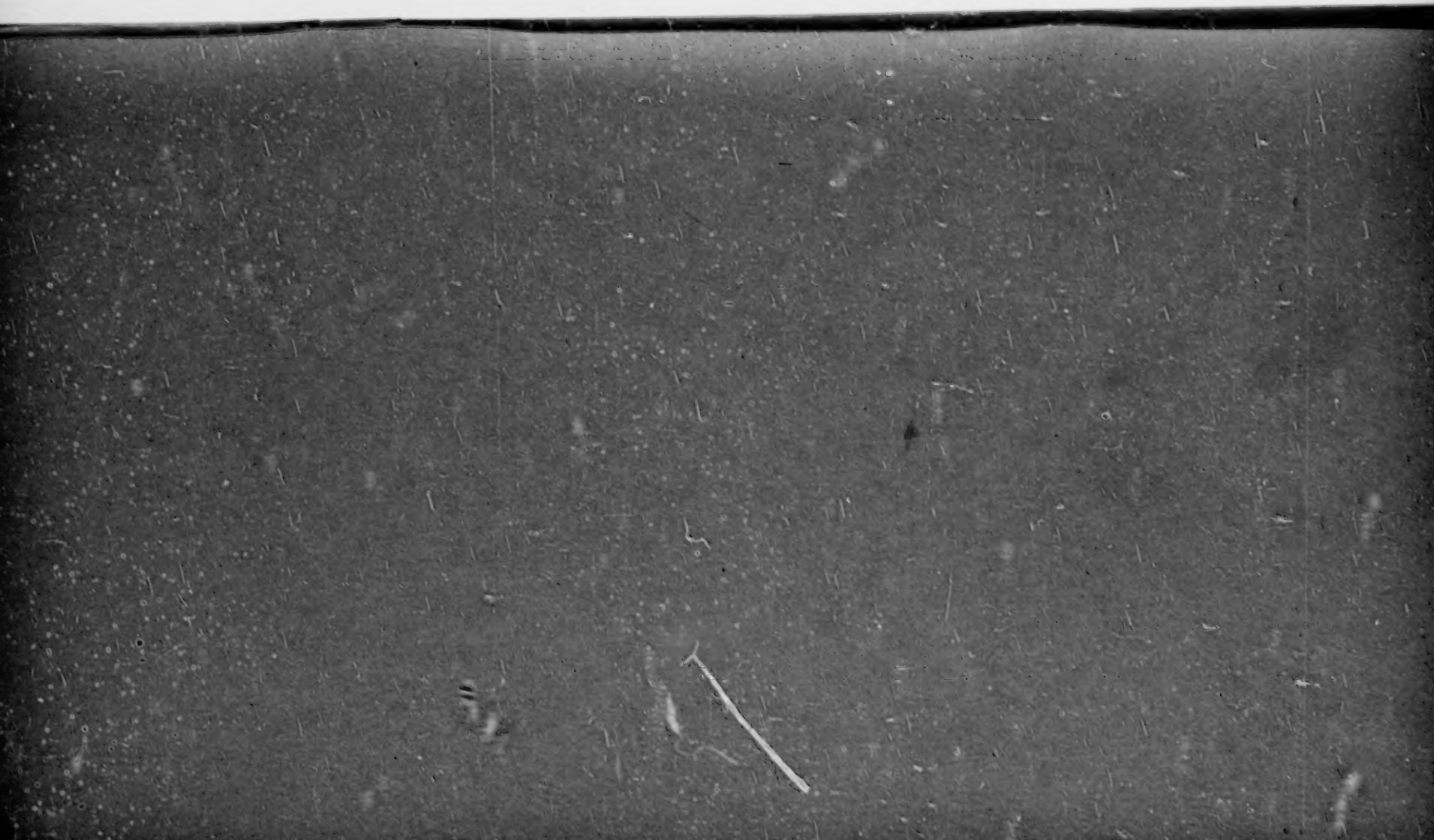

QUESTION PRESENTED

Should this Court grant Certiorari in a case where a federal district court abstained under *Burford* and *Younger* grounds where there was not a colorable preemption claim at the time of the federal district court decison and where a pending state court action involving identical federal issues then proceeded to a final judgment?

STATEMENT REQUIRED BY RULE 28.1

Respondents are Air Products and Chemicals, Inc., Armco, Inc., Ashland Oil, Inc., Huntington Alloys, Inc., Kentucky Electric Steel Company and Pickands Mather & Co. These companies are all members of the Kentucky Industrial Utility Customers ("KIUC"), a group of industrial corporations organized to participate in electric and gas utility matters in Kentucky.

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SUMMARY OF ARGUMENT

The sole issue presented by the Petitioners to the Sixth Circuit Court of Appeals was whether the federal district court correctly applied the *Burford* and *Younger* abstention doctrines. The facts of this case are properly characterized as a prudency of choice case involving two distinct rates filed at the FERC and not as a case where a state commission has refused to give effect to one filed rate at the FERC.

There is no preemption issue which could serve as a basis for denying abstention because the FERC historically declines, and in this case has specifically declined, to take jurisdiction on the prudency issue. All of the cases which Petitioners have cited as being in conflict with the Sixth Circuit involved proceedings where a colorable preemption argument was raised in federal court; this case is thus distinguishable and does not conflict with the other circuits.

Whether or not abstention by the district court was proper, Petitioners have fully and freely litigated all of their federal claims in state court, rendering moot through res judicata principles any issues which could be decided by a federal district court.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,

Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, et al.,

Respondents.

BRIEF OF RESPONDENTS AIR PRODUCTS AND CHEMICALS, INC., ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

This case is depicted by American Electric Power Company, Inc. ("AEP") et al., Petitioners, as conflicting with cases arising in the Third, Fifth, Eighth, Ninth, Eleventh, and District of Columbia Circuits. (Petition at 2). The Kentucky Public Service Commission ("Kentucky Commission") is described as "parochial" and is portrayed as refusing to give effect to "governing FERC [Federal Energy Regulatory Commission] rate schedules." (*Id.*). However, we believe this case is unique

because there is no colorable preemption issue and the case has already gone to a final judgment in a state administrative proceeding and to a final judgment in state court in a second, independent, proceeding. This uniqueness prevents the Sixth Circuit's decision from even facially resembling decisions of the other circuits.

The Petitioners set up the problem as involving the wrongful refusal of the Kentucky Commission to follow one "filed rate" (Unit Power Agreement) at the Federal Energy Regulatory Commission ("FERC"). Petitioners also argue here that the Kentucky Commission had no jurisdiction to interpret the basic FERC rate schedule that applies to the AEP companies, the System Interconnection Agreement.

The Petition provides no analysis of what it means to have a "filed rate" at the FERC. The reader is thus left with the erroneous impression that merely because the FERC has accepted a rate for filing, then the FERC takes jurisdiction over the question of whether the agreement is prudent. However, the FERC has repeatedly held that it will not rule on prudence. *Southern Company Services, Inc.*, 26 FERC (CCH) ¶ 61,360 at 61, 796 (1984); *Pennsylvania Power and Light Co.*, 23 FERC (CCH) ¶ 61,006 at 61,019 (1983).

Petitioners give only slight reference to the fact that in determining not to grant costs based upon the Unit Power Agreement, the Kentucky Commission *did* grant costs based upon the AEP System Interconnection Agreement. This Agreement *requires* payments based on average costs of the Surplus Members and was recently approved by the United States Sixth Circuit Court of Appeals, after years of examination into the very issues which are now again raised. *Ohio Power Co.* v. *FERC*, 668 F.2d 880 (6th Cir. 1982). Petitioners state:

> "The Kentucky Commission took this action [ruling on prudency] despite the fact that the Unit Power Agreement is the 'filed rate' and that *in Kentucky Power's view* the System Interconnection Agreement had required Kentucky Power to enter into that Unit Power Agreement. In any event, FERC has exclusive jurisdiction to construe the System Interconnection Agreement and to allocate low-cost and higher-cost power supplies among the AEP companies." (Petition at 5) (Emphasis added).

In presenting their Statement of the Case, Petitioners do not develop the factual background concerning the System Interconnection Agreement nor do they point out that from August 27, 1982 to August 2, 1984 Kentucky Power itself elected to take the position that it was the *obligation* of the Kentucky Commission to interpret the System Interconnection Agreement and to follow *it* as the filed rate.

Factual Background

The AEP System Interconnection Agreement was initially approved by the Federal Power Commission (the predecessor to FERC) in 1951 and has been amended several times since. The Agreement requires those members with less than their pro-rata share of total system generating capacity (Deficit Members) to make monthly payments to those members with more than their pro-rata share of total system generating capacity (Surplus Members). In return for making these monthly payments to Surplus Members, Deficit Members are supplied with electric power to meet their customers' needs from the AEP Pool. Kentucky Power is a Deficit Member. At the present time and for the past several

years the AEP Pool has possessed huge amounts of excess generating capacity so that there has been and there continues to be no drain on the AEP Pool by virtue of the fact that Kentucky Power is a Deficit Member.

Rockport Generating Facility

Initially, it was planned that Indiana and Michigan Electric Company ("I&M"), one of the AEP Member Companies, would own 100% of the Rockport Generating Units, described by Petitioners at page four of their Petition. AEP subsequently concluded that Rockport should be owned 50% by I&M, 15% by Kentucky power, and 35% by AEP Generating Company, another wholly-owned subsidiary of AEP. This decision required the permission of the Kentucky Commission under KRS 278.020 ("Certificate of convenience and necessity required for construction or operation of utility; exceptions; approval of commission required for acquisition or transfer of ownership of utility." (App. 1a).

From 1978 through 1984 Kentucky Power fruitlessly sought authorization from the Kentucky Commissioin to purchase a 15% ownership interest in the Rockport generating plants. In one instance the Commission's Order was appealed to, and remanded by, the Kentucky Court of Appeals (App. 3a) solely to look at the System Interconnection Agreement.

In this Order of August 27, 1982 the Court found:

> "The integrated AEP System Pool Agreement is crucial to the factual determination by the Commission."
>
> "In order to determine on appeal that Kentucky Power is treated fairly in relation to the other members of the AEP pool, it is necessary to have the document of record . . ."

"The testimony should then be tested against the Agreement itself." (App. 5a-6a).

Kentucky Power and AEP did not appeal this Order and did not argue, as they do now, that the FERC has exclusive jurisdiction to construe the System Interconnection Agreement. They did not even allege that the FERC had primary jurisdiction to interpret the Interconnection Agreement. Instead they made an *election* dutifully to submit the System Interconnection Agreement for analysis by the Kentucky Commission and presented live witnesses in support of their interpretation of that Agreement in proceedings before the Kentucky Commission. On August 2, 1984, the Kentucky Commission issued a Revised Order on Remand denying Kentucky Power's application to purchase Rockport. Kentucky Power did not appeal the August 2, 1984 Order.

The same day Kentucky Power was denied authority to *own* 15% of Rockport, it filed with the FERC a Unit Power Agreement whereby it simply contracted to *buy* 15% of the output of Rockport from its sister company: the AEP Generating Company. The unit Power Agreement is the same as the outright purchase of an ownership interest in Rockport since under either scenario Kentucky Power would be financially responsible for 15% of all Rockport costs and entitled to receive 15% of all Rockport power. The mere filing of this Unit Power Agreement, Petitioners now argue, has the legal effect of overturning the findings in the Kentucky Commission's August 2, 1984 Order and a subsequent Order entered December 4, 1984.

On October 1, 1984 the FERC issued an Order stating that the Kentucky Commission had jurisdiction to consider the appropriateness of Kentucky Power's acquisition of new facilities and that the regulatory roles of the

FERC and the Kentucky Commission did not conflict or overlap. *AEP Generating Co.*, 29 FERC (CCH) ¶ 61,002 at 61,003 (1984).

On November 23, 1984 the FERC issued another Order in the Kentucky Power Unit Power case clarifying its prior Order and resolving questions regarding the extent of FERC's jurisdiction in light of the extensive proceedings that had already occurred before the Kentucky Commission. In *AEP Generating Co.*, 29 FERC (CCH) ¶ 61,246 at 61,501 (1984), the FERC held that its jurisdiction was limited to determining only what a reasonable rate for the sale of power from Rockport would be in light of Rockport costs. The FERC further declared:

> "[I]n this proceeding we do not intend to make or consider any findings concerning [Kentucky Power's] prudence in entering the agreement, in light of the availability of alternative power supplies." *Id.*

On December 4, 1984, the Kentucky Commission issued an Order in a Kentucky Power rate case which reaffirmed the conclusion in its August 2, 1984 Order that Kentucky Power had continuing authority under the terms of the System Interconnecton Agreement to purchase additional capacity and energy to meet its customers' demands from the AEP Pool. The Kentucky Commission held that Kentucky Power had acted imprudently in acquiring much more expensive capacity by means of the Unit Power Agreement. The Kentucky Commission partially denied Kentucky Power's request to increase its rates to reflect the difference between the cost of acquiring capacity from the AEP Pool under the FERC approved AEP System Interconnection Agree-

ment and the cost of acquring Rockport capacity under the terms of the Unit Power Agreement also then on file at the FERC. However, the Kentucky Commission did allow Kentucky Power an additional $14 million in rates to account for the fact that Rockport was now a part of the AEP Pool and that as a Deficit Member, Kentucky Power had an obligation to make increased payments to the AEP Pool.

Proceedings In Lower Courts

Petitioners filed this suit in federal district court on December 12, 1984, eight days after the Kentucky Commission entered its second Order interpreting the Interconnection Agreement and 112 days after the appeal time had run from the Kentucky Commission's first Order interpreting the Interconnection Agreement. However, another eight days after that, on December 20, 1984, Kentucky Power elected to submit the identical case to the Kentucky state courts by filing a complaint in the Franklin Circuit Court which raised all federal issues, state issues, and sought injunctive relief under KRS § 278.410(3). (App. 9a).

The Franklin Circuit Court is a court of special expertise in utility matters and all appeals from the Kentucky Commission are required by Kentucky law to be heard there. KRS 278.410(1). (App. 9a) Kentucky Power's state court action was filed without any motion or letter reserving the federal issues for later determination in the federal court. Similarly, no other party reserved the federal issues for federal court.

This December 20, 1984 state court filing by Kentucky Power was not at that time made under the duress of an adverse ruling in federal court, but was made

totally voluntarily, since it was not until January 16, 1985 that the federal district court, *noting the existence of the ongoing state proceeding*, abstained. The Sixth Circuit Court of Appeals affirmed the district court by Order issued March 24, 1986, again relying heavily on the fact that there was an ongoing state proceeding.

All major procedural events took place in the Kentucky state court (the full procedure in this case is indicated by the attached docket sheet (App. 10a)) culminating in an Order upholding the Kentucky Commission's interpretation of the System Interconnection Agreement and ruling on the federal claims of Kentucky Power. (App. 16a).

REASONS FOR NOT GRANTING THE WRIT

A. Burford & Younger Abstention Doctrines

In *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), this Court set up two standards as a basis for abstention: First, the presence of a complex state regulatory scheme which would be disrupted by federal court review; and second, the existence of a state-created forum with specialized competence in the particular area. *See Ada-Cascade Watch Co.* v. *Cascade Resource Recovery*, 720 F.2d 897 (6th Cir. 1983). "The purpose of *Burford* abstention is to avoid federal intrusion into matters of local concern and which are within the special competence of local courts." *International Brotherhood of Electrical Workers* v. *Public Service Comm'n of Nevada*, 614 F.2d 206 (9th Cir. 1980). *Burford* abstention is particularly appropriate in light of the great interest that states have in regulating retail utility rates within their

boundaries. *See Arkansas Elec. Coop. Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375 (1983). While "supremacy claims are 'essentially one[s] of federal policy' so that 'the federal courts are particularly appropriate bodies for the application of preemption principles,' " *Kennecott Corp.* v. *Smith*, 637 F.2d 181, 185 (3rd Cir. 1980), *Burford* abstention is proper where detailed fact finding is required to evaluate a plaintiff's claim of preemption. *Aluminum Co. of America* v. *Utilities Comm'n* v. *Utilities Comm'n of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), cert. denied, 465 U.S. 1052 (1984).

In order for abstention to be proper under *Younger* v. *Harris*, 401 U.S. 37 (1971), a three-prong test must be satisfied. "First, there must be an ongoing state judicial proceeding. Second, the proceeding must implicate important state interests. Third, there must be an opportunity in the state proceeding to raise the federal constitutional challenge." *Coruzzi* v. *State of New Jersey*, 705 F.2d 688, 690 (3rd Cir. 1983). Just as with *Burford* abstention, preemption is the critical element in determining whether *Younger* abstention is appropriate. "The legitimate state interest contemplated by *Younger*, *see Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423 (1982), . . . does not exist when the state action has been preempted or foreclosed by the Constitution " *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985); *see also Champion Int'l Corp.* v. *Brown*, 731 F.2d 1406 (9th Cir. 1984); *Baggett* v. *Department of Professional Regulation, Bd. of Pilot Comm'rs*, 717 F.2d 521 (11th Cir. 1983).

B. No Colorable Preemption Claim

The instant case does not present a colorable preemption claim which is the *sine qua non* to avoiding abstention in the cases cited by Petitioners. Indeed this case demonstrates that a high degree of cooperation and respect existed between the federal and the state regulatory agencies during the relevant time period. Such cooperation and respect existed at no time in the cases cited by Petitioners.

On December 4, 1984 the Kentucky Commission determined that Kentucky Power had the option of obtaining power under either of *two* rates on file at the FERC: (1) obtaining it from the AEP Pool under the System Interconnection Agreement; or (2) obtaining it directly from Rockport under the Unit Power Agreement. The Kentucky Commission concluded that purchasing power from the AEP Pool was the more prudent option. The Kentucky Commission's ruling or prudency could in no way be deemed to conflict with the FERC since the FERC specifically declined to rule on prudency and there was thus no preemption question which could serve as the basis for denying *Burford* or *Younger* abstention.

To put it another way, since the FERC itself, while acknowledging that there were two filed rates, quite properly refused to make a value judgment comparing the two FERC filings of Kentucky Power, this area of inquiry and determination — always a proper subject for state commission review, in our view — was left rather clearly to the state public service commission by the FERC.

Viewed this way, the federal district court and the Sixth Circuit Court of Appeals really had no underlying federal case to hear at the time they ruled. Thus, the ap-

plication of the abstention doctrine by the federal courts was proper as there was no preemption question as to which regulatory body should rule on the prudency issue.[1]

C. A Final State Court Judgment On All Federal Issues Now Renders A Federal Action At The District Court Moot.

In light of the unappealed administrative Kentucky Commisison Order of August 2, 1984 and the separate state court Order of March 24, 1986, (issued after briefing and oral argument at the Sixth Circuit and issued the same day as the Sixth Circuit Court's Order) a new issue has arisen: mootness. It would now be futile for this Court to review the Sixth Circuit's application of the abstention doctrine. Decisions of this Court have addressed the ultimate question which is now presented: whether a federal court that initially abstained from hearing a case may then hear that same case after the federal issues have been fully litigated and decided in state court.[2]

---

[1] By Orders issued August 20, 1986, in *AEP Generating Co.*, 36 FERC (CCH) ¶ 61,226 (1986) and *Kentucky Power Co.*, 36 FERC (CCH) ¶ 61,227 (1986), the FERC has further elaborated upon its above stated position that its role in the Kentucky Power Unit Power case would be limited to determining whether the Rockport sale to Kentucky Power was at a reasonable rate based on Rockport costs, and not whether there was a more economical option available to Kentucky Power. The FERC may have now attempted to examine whether Kentucky Power should be required to purchase Rockport power. Notwithstanding the legal effect of these Orders by the FERC, at the time the federal courts abstained, there was no valid preemption claim.

[2] At page 11 of its Petition, Kentucky Power attempted to address the question of the effect of concurrent jurisdiction. In support of its implication that it should be able to continue with its federal case even though there has been a final decision in an identical state court proceeding which it in-

In *England* v. *Louisiana medical Examiners*, 375 U.S. 411 (1964), plaintiffs brought suit in federal district court seeking an injunction and declaration that a certain state statute, as applied to them, violated the Fourteenth Amendment. A three judge federal district court invoked the principles of abstention.

Plaintiffs then brought suit in state court where they also sought injunctive and declaratory relief and where they unreservedly submitted their federal claim for decision. The state proceedings terminated with a decision by the Louisiana Supreme Court declining to review an intermediate appellate court's holding that the statute did not violate the Fourteenth Amendment. The plaintiffs then returned to federal district court, which dismissed the complaint on the grounds that the Louisiana state courts had passed on all the issues raised.

On direct appeal, this Court held (prospectively) that a litigant in federal court who is remitted to a state court under the doctrine of abstention may preserve his right to return to federal court for the disposition of his federal contentions only by refusing to litigate his federal contentions in state court.

In *England*, the Court stated:

> ". . . We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there,

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itiated, Kentucky Power cited *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Commission*, 791 F.2d 1111 (3rd Cir. 1986) and *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). However, these cases involved situations where it was held that a federal court maintained concurrent jurisdiction even though the same claim was *pending* in a state court. In neither of these cases was there a *final judgment* in state court. Thus, neither of these two cases have any bearing here.

> and has them decided there, then — whether or not he seeks direct review of the state decission in this court — he has elected to forego his right to return to the district court." *Id.* at 418-19.

The Franklin Circuit Court has already ruled on all the claims voluntarily presented by Kentucky Power, including its federal claims. Even if this Court now determined that abstention was improper on January 16, 1985, because all federal issues have since been passed upon on March 24, 1986 in state court, upon remand, the federal court would be forced to dismiss the action.[3]

In light of the above, the federal district court is bound by the doctrine of res judicata. This Court has recently held that the findings of fact rendered in a state administrative proceeding which was not appealed and therefore was not reviewed by a state court should nevertheless be given preclusive effect by a federal court. *University of Tennessee* v. *Elliot*, 106 S.Ct. 3220, 3227 (July 7, 1986). Thus, the findings of fact made in the August 2, 1984 Order of the Kentucky Commission, which was not appealed by Kentucky Power, would be binding on the federal court upon remand as a foundation for its consideration of the constitutional issues.

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[3] On August 26, 1985, the Judge as well as all of the parties in the state court case signed an Order of Submission which submitted that case to the Franklin Circuit Court for a final decision. (App. 15a) However, by letter dated September 23, 1985, counsel for Kentucky Power indicated that its federal claims were presented in state court only because of the federal district court's abstention and that it planned to pursue its federal claims in district court if it prevailed in its appeal to the Sixth Circuit. This letter request was objected to by counsel for the Kentucky Commission. The Kentucky Power request was disregarded by the state court presumably because it came after Kentucky Power had fully litigated and submitted all of its claims to the court. Kentucky Power's letter request was not made a part of the official record of this case. (App. 15a).

Secondly, the March 24, 1986 ruling by the Franklin Circuit Court, containing both findings of fact and conclusions of law relating to Kentucky Power's constitutional claims, would also be binding on a lower federal court. When a suit is pending in a state and federal court concurrently, both actions may proceed until a judgment is obtained in one court which may then be pleaded as a bar under the res judicata doctrine. *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania ex rel. Schnader*, 294 U.S. 189 (1935).

The fact that the state court decision is currently being appealed does not prevent that judgment from being pleaded as a bar because in Kentucky a judgment is final until reversed or modified. *Small* v. *Reeves*, 76 S.W. 395 (Ky. 1903); *see also Vaughn's Adm'r.* v. *Louisville & N.R. Co.*, 179 S.W.2d 441 (Ky. 1944). Moreover, a judgment which is on appeal can be plead as res judicata and such pleading is binding on a second court even if the judgment in the first case is later overruled. *Reed* v. *Allen*, 286 U.S. 191 (1932). The *Reed* v. *Allen* rule has been adopted by the RESTATEMENT (SECOND) OF JUDGMENTS § 16 (1982).

Because the decision of the Franklin Circuit Court and the findings of the Kentucky Commission are binding in federal court, there would remain for the federal district court no "actual matters in controversy essential to the decision of the particular case before it." *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920). The duty of this Court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Local No. 8-6, Oil, Chem. & Atom Wkrs.* v. *Missouri*, 361

U.S. 363, 367 (1960). Because Kentucky Power's federal suit alleges the same claims that have already been decided in state court, "considerations of comity as well as repose militate against redetermination of the issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court." *Montana* v. *United States*, 440 U.S. 147, 163 (1979). Kentucky Power initiated this suit in federal as well as state court and fully litigated all issues in state court. The decisions of the Franklin Circuit Court and the Kentucky Commission are now binding on all of the parties which renders this Petition moot.

CONCLUSION

This case does not conflict with the decisions of the other circuits because of the unique factual and procedural posture of the case which, unlike any of the cases cited by Petitioners, presents no colorable preemption claim. Because all of Petitioners' federal claims have already been decided, the issues in the Petition — i.e., whether the federal district court should have abstained — are now moot.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated September 2, 1986

* *Counsel of Record*

APPENDIX

278.020 Certificate of convenience and necessity required for construction or operation of utility; exceptions; approval of commission required for acquisition or transfer of ownership of utility

(1) No person, partnership, public or private corporation or combination thereof shall begin the construction of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until such person has obtained from the public service commission a certificate that public convenience and necessity require such construction. Upon the filing of an application for such certificate, and after any public hearing which the commission may in its discretion conduct for all interested parties, the commission may issue or refuse to issue the certificate, or issue it in part and refuse it in part. Unless exercised within one (1) year from the grant thereof, exclusive of any delay due to the order of any court or failure to obtain any necessary grant or consent, the authority conferred by the issuance of the certificate of convenience and necessity shall be void, but the beginning of any new construction or facility in good faith within the time prescribed by the commission and the prosecution thereof with reasonable diligence shall constitute an exercise of authority under the certificate.

(2) No utility shall exercise any right or privilege under any franchise or permit, after the exercise of that right or privilege has been voluntarily suspended or

discontinued for more than one (1) year, without first obtaining from the commission, in the manner provided in subsection (1) of this section, a certificate of convenience and necessity authorizing the exercise of that right or privilege.

(3) No utility shall apply for or obtain any franchise, license or permit from any city or other governmental agency until it has obtained from the commission, in the manner provided in subsection (1) of this section, a certificate of convenience and necessity showing that there is a demand and need for the service sought to be rendered.

(4) No person under the jurisdiction of the commission shall acquire or transfer ownership of or control, or the right to control, any utility, by sale of assets, transfer of stock or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

OPINION RENDERED: August 27, 1982; 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 82-CA-267-MR

STEVEN L. BESHEAR, ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY
Appellant

v.

PUBLIC SERVICE COMMISSION
COMMONWEALTH OF KENTUCKY AND
KENTUCKY POWER COMPANY
Appellee

Appeal From Franklin Circuit Court
Hon. Henry Meigs, Judge
Civil Action No. 81-CI-1349

REVERSING AND REMANDING

BEFORE: HAYES, Chief Judge, WHITE, and WINTERSHEIMER, Judges.

WINTERSHEIMER, JUDGE. This appeal is from an order issued December 21, 1981, which affirmed a decision of the Public Service Commission granting Kentucky Power Company a certificate of convenience and necessity to acquire a 15% interest in a power plant being built in Rockport, Indiana.

The questions presented are whether the Commission's findings of fact were sufficient to support its order; whether the Commission was required to explain the benefits of the integrated AEP system; whether the Commission violated the statute by granting the company a certificate; and whether the order of the Commission is contradictory.

This is the second appeal of this case. On February 4, 1981, the Kentucky Supreme Court remanded the matter to the Public Service Commission to comply with the directions of the Court of Appeals. The original application requested authority to purchase an undivided 15% interest in a plant under construction by the Indiana and Michigan Electric Company near Rockport, Indiana. Kentucky Power is a wholly owned subsidiary of American Electric Power system (AEP), and is one of eight entities which comprise AEP. Kentucky Power has its headquarters in Ashland, Kentucky. The power pool is dispatched on an economic basis from a central facility in Canton, Ohio.

At a hearing on September 3, 1981, the prepared testimony of six company witnesses was presented emphasizing the benefits of membership in the AEP system. Cross-examination followed. Neither the Consumer Protection Division nor the Commission staff offered any witnesses in opposition to the company application. The Commission determined that the company, by participating in the Rockport project, would be meeting its obligations to the AEP system and the result would be substantial benefits to the company and its customers. The AEP interconnection agreement is not in the record. The Franklin Circuit Court upheld the Commission order. This appeal followed.

This Court reverses the decision of the circuit court and remands this case to the Public Service Commission

with directions that the Commission either deny the certificate or resume a review of the case for specific findings of fact in regard to the net benefits, if any, conferred by the AEP pool agreement in this instance.

We find it impossible as a reviewing Court to know whether the Commission has acted properly in granting this certificate. The power pool agreement is not in the record of this case. Because the power pool agreement is an integral and essential part of the proposed undertaking, the utility's case is deficient to the extent that this basic document is absent. The agreement is frequently mentioned by company witnesses and protestants. The Commission order refers to benefits and responsibilities resulting from the integrated pool system. The rules of evidence provide that when an agreement is central to a controversy, the best evidence is the document itself.

In order to sustain an order of any administrative agency, there must be specific findings of fact. *See Energy Regulatory Commission* v. *Kentucky Power Company*, Ky.App., 605 S.W.2d 46 (1980). When the decision of a Regulatory Commission depends on a determination of fact, the absence of basic evidentiary facts is fatal to such a decision. *Marshall County* v. *So. Central Bell Telephone Co.*, Ky., 519 S.W.2d 616 (1975).

Upon remand, the Commission should have the agreement filed in the record, allow full examination and analysis by its staff and the parties to this matter, and find the facts based on such consideration and other evidence already in the record.

The integrated AEP system pool agreement is crucial to the factual determination by the Commission. The AEP power pool agreement is not an arms length transaction. Although the Consumer Protection Division did not request the agreement prior to the hearing, they did

raise the issue at the hearing but were not permitted to develop the matter. We believe such denial was improvident. It is important for an administrative agency to have all of the necessary facts and information that are available to it to be included in its record. The adversarial nature of hearings before the Public Service Commission must give way to the controlling concern for all the facts so that an impartial and proper determination can be made. Technical questions as to the burden of proof must be resolved in favor of full disclosure before the Commission.

In order to determine on appeal that Kentucky Power is treated fairly in relation to the other members of the AEP pool, it is necessary to have the document of record. It is not enough to have the agreement filed elsewhere as with the FERC. It should be filed in this case with the Kentucky Public Service Commission. The testimony should then be tested against the agreement itself. The result is entirely within the purview of the Commission.

In view of our decision, we do not believe it is necessary to address the other issues raised on appeal.

The order of the circuit court is reversed. This matter is remanded with directions to return the case to the Public Service Commission for a specific finding of fact as to the AEP power pool agreement after it has been placed of record.

ALL CONCUR.

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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

CERTIFICATE

I, Jeanette Mulley, Chief Deputy Clerk, Court of Appeals of Kentucky, do hereby certify that the foregoing Opinion, rendered August 27, 1982, in the case of Steven L. Beshear, etc., vs. Public Service Commission, etc., et al., File No. 82-CA-267-MR, is a true and correct copy as same appears on file in this Court.

DATE: August 5, 1986 /s/ JEANETTE MULLEY,
CHIEF DEPUTY CLERK

I, John P. Hayes, Chief Judge of the Court of Appeals of Kentucky, do hereby certify that Jeanette Mulley, whose signature is affixed to this certificate, is Chief Deputy Clerk of the Court of Appeals, having been appointed on February 1, 1977.

DATE: August 5, 1986 /s/ JOHN P. HAYES,
CHIEF JUDGE

I, Jeanette Mulley, Chief Deputy Clerk of the Court of Appeals, do hereby certify that John P. Hayes, whose signature is affixed above is and has been a Judge of the Court of Appeals of Kentucky since August, 1976.

DATE: August 5, 1986 /s/ JEANETTE MULLEY,
CHIEF DEPUTY CLERK

278.410 Action to review order of commission; institution; answer; injunction

(1) Any party to a commission proceeding or any utility affected by an order of the commission may, within twenty (20) days after being served with the order, or within twenty (20) days after its application for rehearing has been denied by failure of the commission to act, or within twenty (20) days after being served with the final order on rehearing, when a rehearing has been granted, bring an action against the commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable. Notice of the institution of such action shall be given to all parties of record before the commission.

(2) The answer of the commission shall be served and filed within twenty (20) days after service of the complaint. The action shall then be at issue and stand ready for trial upon ten (10) days' notice to either party, on the equity side of the docket of the court. The answer need not deny verbatim the allegations of the petition, but a general denial thereof on behalf of the commission shall be sufficient.

(3) Injunctive relief may be granted by the circuit court in the manner and upon the terms provided by law.

COMMONWEALTH OF KENTUCKY
COURT OF JUSTICE
FRANKLIN COUNTY CIRCUIT COURT
Judge William Graham

Case No. 84-CI-1760

Kentucky Power Company,
Plaintiff,

vs.

Kentucky Public Service Commission
and
Office of the Attorney General
Consumer Protection Division

Air Products and Chemicals, Inc.
Armco, Inc., Ashland Oil, Inc.
Huntington Alloys, Inc. and Ky. Electric Steel Co.

John Henry Ward, Bert Diamond, Sada Crum and
Concerned Citizens of Martin Co.

Blue Diamond Mining, Inc.,
Defendants.

CIVIL DOCKET ENTRIES

Date	Proceeding
12-21-84	Complaint filed. Summons and 7 copies issued to Parties by certifed mail by the office of Bruce Clark
12-27-84	Certified receipt confirming service on Thomas Emerson for Attorney General on 12/26/84.
	Certified receipt confirming service on

Richard Raff by signature of Joey Travhille on 12/26/84.
Certified receipt confirming service on Michael Beiting by signature of Carmilia Booher on 12/26/84.
Certified receipt confirming service on Bruce Abel on 12/26/84 by signature of Linda Pitstick.

1- 2-85 Answer of Blue Diamond Mining, Inc. filed.

1- 2-85 Certified receipt confirming service on Francis J. Mellen by signature of Candy Hall on 12/28/84.
Certified receipt confirming service on Anthony Martin on 12/27/84.
Certified receipt confirming service on David Rubinstein by signature of Donna Blackburn on 12/31/84.

1- 3-85 Answer of the Attorney General filed.

1- 7-85 Answer of the Defendant, John Henry Ward, et al.

1- 8-85 Answer of the Public Service Commission.

1-11-85 Answer of Air Products and Chemicals, Inc., Armco Inc., Ashland Oil, Inc., Huntington Alloys, Inc. Ky. Electric Steel Co. and Pickands Mather & Co. filed.

1-18-85 Notice, Motion, Order to set briefing schedule.

1-28-85 Notice, Motion, Order for Temporary Injunction.
Summary of Argument.
Memorandum in support of Plaintiff's Motion for Temporary Injunction.

1-30-85 Affidavit of Robert E. Matthews.
Affidavit of Gerald P. Maloney.
Affidavit of Joseph H. Vipperman.
Affidavit of Coulter R. Boyle, III.
Revised Order Scheduling Hearing.

2- 4-85 Response to Motion for Temporary Injunction filed by Atty. Gen.
Memorandum in response to plaintiff's motion for temporary Injunction.

2- 4-85 Response of Residential Intervenors to Motion for Preliminary Hearing.

2- 4-85 Motion for Protective Order.
Memorandum of Air Products and Chemicals, Inc., Armco Inc., Ashland Oil, Inc., Huntington Alloys, Inc., Ky. Electric Steel Company and Picklands Mather & Co. In Opposition to Motion for Preliminary Injunction.
Appendix to Memorandum.
(Sealed Protective Order filed)

2- 5-85 Memorandum of defendant Ky. Public Service in opposition to motion for temporary injunction filed.

2- 7-85 Proposed Findings of Fact and Conclusions of law tendered by Kentucky Power Company.

2- 8-85 Order filed that the motion for temporary injunction is denied.
Copies and certification mailed to David Rubinstein, Anthony G. Martin, Francis J. Mellen, Jr., Richard Northern, Michael R. Beiting, Lively M. Wilson, Bruce F. Clark, F. Bruce Abel, David F. Boehm, James J. Ryan, Wm. M. Sawyer.

3-12-85 Order appointing Connie Sewell as the Official reporter in the action.

3-14-85 Order setting out Briefing Schedule.
Agreed Order Dismissing Blue Diamond Coal Is hereby dismissed as a party defendant.

4-11-85 Brief of Kentucky Power Company filed.

4-19-85 Entry of appearance filed by Wm. P. Curlin, Jr., Hazelrigg & Cox as co-counsel for Ky. Industrial Utility Customers.

4-26-85 Record before PSC filed. (2 boxes in back room)

5- 2-85 Motion for an extension of time to file brief.

5-10-85 Motion for an extension of time to file brief filed by Ky. Industrial Utility Customers.

5-10-85 Order filed that Intervenors shall have 37 days from the date of the filing of Plaintiff's brief in which to file a response. Copies to all parties.

5-13-85 Brief of Appellees John Henry Ward, Et. al.

5-14-85 Brief of the Appellee Attorney General.

5-20-85 Answer brief of Ky. Industrial Utility Customers filed.

5-20-85 Brief of defendants, Ky. Public Service Commission and individually named Commissioners filed.

5-24-85 Motion for extension of time filed by plaintiff.

5-24-85 Order extending time to file reply of plaintiff to and including June 10, 1985.

6- 6-85 Order that the Defendant Ky. Public Service Commission shall have.

6-10-85 Reply Brief of Kentucky Power Company filed.

6-14-85 Transcript of Evidence.

6-27-85 Motion to strike limited portion of reply brief of Ky. Power Co. filed.

7- 1-85 Motion filed by plaintiff to set for oral argument.

7-12-85 Order setting for Oral Argument on July 19, 1985.

7-15-85 Pages substituted into the Reply Brief of Plaintiff.

7-18-85 Supplemental Memorandum of Ky. Industrial Utility Customers.

7-26-85 Kentucky Power's response to Supplemental Memorandum of Kentucky Industrial Utility Customers.

8- 2-85 Order submitted to be tendered by defendants.
Notice of Recent FERC Decision.

8- 2-85 Opinion and order tendered by Kentucky Power.

8-14-85 Joint response of Attorney General and residential intervenors to notice of FERC Decision.

8-14-85 Response of Ky. Industrial Utility Customers to Notice by Ky. Power Company of Recent FERC Decision.

8-16-85 Kentucky Public Service Commission's response to notice of recent FERC Decision.

8-26-85 Order of submission filed. Record submitted to Judge Graham.

8-29-85 Motion for leave to file additional authority and statement of authority filed by plaintiff.

9- 4-85 Response in opposition to plaintiff's motion for leave to file statement of additional authority filed by defendant PSC.

3-24-86 Judgment affirming the Order of the PSC in Case No. 9061 and all relief sought by the Plaintiffs herein is denied. Copies to all parties.

4-18-86 Notice of appeal filed by Kentucky Power, copies to Richard G. Raff, Pamela Johnson, F. Bruce Abel, William P. Curlin, Anthony G. Martin, Bruce Clark and John C. Scott.

4-28-86 Designation of record on appeal filed.

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

84-CI-1760

KENTUCKY POWER COMPANY
PLAINTIFF

v.

KENTUCKY PUBLIC SERVICE
COMMISSION, et al.
DEFENDANT

JUDGMENT

(Filed March 24, 1986)

This appeal is before the Franklin Circuit Court on petition of the plaintiff Kentucky Power Company for review of a rate order issued by the Kentucky Public Service Commission on December 4, 1984. The plaintiff Kentucky Power Company moved this Court for temporary injunctive relief from that order, which motion was denied on February 8, 1985. The case is now before the Court for review of the merits of the Commission's order.

FACTUAL HISTORY

This appeal is merely one installment in a rather lengthy controversy before the defendant Commission. Kentucky Power is a wholly owned subsidiary of American Electric Power Company, Inc. (AEP) and is engaged in the business of supplying electric energy to

numerous Kentucky customers. The Kentucky Public Service Commission is vested by Kentucky law with jurisdiction over the company's retail rates.

AEP is a utility holding company and the parent company of numerous utility companies which provide electric energy in several States. The AEP system is a fully integrated interstate utility system.

Beginning around 1978, Kentucy Power sought permission to buy a 15% undivided ownership interest in two large electricity generating plants under construction by Indiana and Michigan Electric (another AEP subsidiary) in Rockport, Indiana. These efforts were not approved by the Public Service Commission or by the Kentucky Appellate Courts.

In September 1981, the Public Service Commission reversed itself and approved Kentucky Power's effort to purchase part of the Rockport plant. On appeal, the Kentucky Court of Appeals reversed that order of the Commission, directing the Commission to make specific findings of fact and to determine other issues. Additional hearings were held by the PSC and again in March 1983, the Commisison approved the purchase of a 15% interest in Rockport by Kentucky Power. That decision by the PSC was reconsidered and new evidence was presented to the Commission. On August 2, 1984, the PSC issued a revised order reversing its previous stand and denying Kentucky Power's application to purchase the 15% share of Rockport. That order was not appealed.

Before the last decision by the PSC, Kentucky Power, Indiana and Michigan, and AEP Generating Company entered into a unit power agreement whereby Kentucky Power agreed to buy 15% of the output of Rockport; this agreement represented the financial equivalent of Kentucky Power owning 15% of Rockport. This agree-

ment required the rate approval of the Federal Energy Regulatory Commission (FERC). FERC approved the rates, subject to refund.

As a basis for its decision the PSC had ruled that Kentucky Power could meet its capacity needs by buying surplus power available to it from the AEP power pool. This was possible because the pool had excess capacity, even without the Rockport plant. The PSC concluded that it was cheaper for Kentucky Power to purchase the needed power from the pool under the Interconnection Agreement as opposed to ownership of Rockport. The Commission found that Kentucky Power had a contractual right to purchase from the pool under the Interconnection Agreement.

On December 4, 1984, the PSC ruled that Kentucky Power acted imprudently in entering the unit power agreement to purchase 15% of the power from Rockport when the same amount of power could be purchased under the pool agreement at a substantially lower cost. This ruling was appealed to this Court.

By order of February 8, 1985, this Court denied the plaintiff Company's motion for injunctive relief on the Rockport issue.

Another issue before the Court involves the construction of a transmission line called the Hanging Rock-Jefferson Line. Kentucky Power, along with its sister companies, Appalachian Power Company, Columbus and Southern Ohio Electric, Indiana and Michigan Electric Company and Ohio Power Company, are all members of the AEP system. The AEP system is highly interconnected through utilization of transmission lines.

In 1974, Kentucky Power applied to the Commission for a certificate authorizing construction of a 155 mile transmission line in Kentucky at a cost of $55 million. The transmission line would connect the Hanging Rock

substation of Ohio Power Company with the Jefferson substation of Indiana and Michigan Electric Company (Hanging Rock-Jefferson line) and would not have any outlets in Kentucky. Kentucky Power told the Commission that other members of the AEP system would pay 95% of the line's construction, operation and maintenance costs. A certificate was granted on that basis.

In 1983, Kentucky Power told the Commission that the Hanging Rock-Jefferson line would be completed in 1984 at a cost of $123 million and that none of the other members would pay for any of its costs. The Commission then initiated Case No. 8904 to investigate Kentucky Power's need for the transmission line and its cost responsibility.

During the course of that investigation the AEP system filed with the FERC a Transmission Agreement whereby AEP subsidiaries whose investment in transmission facilities was below a specified level would pay rates to those subsidiaries whose investment exceed the specified level. Pursuant to this FERC agreement, Kentucky Power's transmission investment entitles it to receive revenues from its sister utilities; there are no rates to be paid by Kentucky Power.

The Commission's order in Case No. 8904 found that while the Hanging Rock-Jefferson line did provide some reliability benefits to Kentucky Power and its customers under certain extreme conditions of low probability, it was built primarily to enable the system to transfer large quantities of power from Ohio to Indiana, i.e., bulk power transfers in interstate markets. The Commission further found that the transmission line greatly exceeded Kentucky Power's intrastate needs and consequently, only a portion of the investment should be included in retail rate base. Utilizing an allocation formula similar to the AEP system's allocation of generating capacity

under the Pool Agreement, the Commission found that only 44% of the investment in the Hanging Rock-Jefferson transmission should be included in retail rate base and only 44% of the operating and maintenance expenses should be charged to retail customers. Kentucky Power's rates in Case No. 9061 were based on the 44% limitation as ordered in investigative Case No. 8904.

FINDINGS OF FACT

(1) The AEP Interconnection Agreement does not contain any provisions that would require KPC to buy power from the Rockport plant at incremental cost for purposes of meeting Kentucky Power Company's (KPC) internal demand.

(2) The AEP Interconnection Agreement specifically allows KPC to purchase needed power from the AEP pool at the embedded cost of power generated by the pool.

(3) The record in the proceedings before the Public Service Commission clearly demonstrates that it is less expensive to purchase power from the pool than it is to purchase power pursuant to AEP's proposed unit power agreement.

(4) The Unit Power Agreement between AEP Co., and KPC is the equivalent of the purchase by KPC of 15% of the Rockport plant.

(5) In its Order of October 1, 1984, in Docket No. ER 84-579-000, the FERC found that ". . . Kentucky Commission has jurisdiction to consider the appropriateness of KEPC's acquisition of new facilities . . .," and that there is ". . . no overlap or conflict . . ." between the regulatory roles of FERC and the Kentucky Commission.

(6) In its Order of November 23, 1984, in Docket

No. ER 84-579-000, FERC found that State commissions, as well as FERC, have legitimate concerns ". . . in determining whether purchases reflect prudently incurred expenses for purposes of determining the purchaser's rates for sales to others." FERC further found that ". . . in this proceeding, we do not intend to make or consider any findings concerning KEP Company's prudence in entering the agreement, in light of the availability of alternative power supplies."

CONCLUSIONS OF LAW

(1) PSC acted within its statutory authority in denying recovery of the Unit Power Agreement costs in light of the contractual right of KPC to purchase power at embedded cost from the AEP pool. See *K.U.* v. *PSC*, Ky. 252 SW 885 (1952).

(2) No confiscation occurs when the PSC rejects for ratemaking purposes excessive or imprudently incurred expenses.

(3) The mere filing of a rate schedule for a Unit Power Agreement with FERC does not preempt the PSC from considering the prudence of KPC in entering into the agreement in light of alternative power supplies, and from denying recovery of excessive costs when they are imprudently incurred.

(4) FERC's interpretation of its authority under the Federal Power Act is entitled to great weight, and sufficient cause to question FERC's interpretation has not been shown.

(5) The PSC Orders complained of are not clearly in conflict with the Federal Power Act.

(6) The Commission's fixing of a value of the Hanging Rock-Jefferson line for retail rate making was just and reasonable and supported by the evidence.

(7) There has been no showing by clear and convincing evidence that the Order of the Commission was unreasonable or unlawful. The Order is supported by substantial evidence in the record.

(8) There is no evidence in the record that the rates set by the Commission are confiscatory.

JUDGMENT

WHEREFORE, the Court ORDERS AND ADJUDGES that the Order of the Public Service Commission in Case No. 9061 is hereby *AFFIRMED* and all relief sought by the plaintiffs herein is *DENIED*.

This is a final and appealable judgment and there is no just cause for delay.

SO ORDERED THIS 21 day of MARCH, 1986.

/s/ WILLIAM L. GRAHAM
Judge, Franklin Circuit Court

No. 86-49

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,
Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE KENTUCKY PUBLIC SERVICE COMMISSION IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the lower courts' unpublished decisions properly abstained from considering utility companies' challenges to a Kentucky Public Service Commission rate order when the utilities have brought the same attack on the same order with the same claims in state court and to the Federal Energy Regulatory Commission.

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No. 86-49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,
Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, et al.,
Respondents.

BRIEF FOR THE KENTUCKY PUBLIC SERVICE COMMISSION IN OPPOSITION TO PETITION

OPINIONS AND ORDERS BELOW

The *per curiam* opinion of the Court of Appeals is unpublished and is reproduced in the Appendix to the Petition (Pet. App. 1a-12a).[1] The Court of Appeals' order denying petitioners' motion for rehearing is unpublished and is reproduced in the Appendix (Pet. App. 13a). The Court of Appeals' order denying petitioners' and the Federal Energy Regulatory Commission's motions to publish its decision is unpublished and is reproduced in the Appendix (Pet. App. 14a). The opinion of the District Court is unpublished and reproduced in the Appendix (Pet. App. 15a-23a).

JURISDICTION

The Court of Appeals entered its opinion and judgment on March 24, 1986 (Pet. App. 1a-12a). The Court of Appeals unanimously denied a timely petition for rehearing on May 6, 1986 (Pet. App. 13a). Petitioners assert jurisdiction under 28 U.S.C. §1254(1).

[1]References to the Appendix to the Petition for a Writ of Certiorari are cited as (Pet. App.).

STATEMENT

The lower courts' unpublished decisions abstained from adjudicating petitioners' challenges to a rate order of the Kentucky Public Service Commission (the "Commission") since petitioners simultaneously presented the same challenges to a state court and to the Federal Energy Regulatory Commission ("FERC"). The state court has affirmed the Commission on the merits and petitioners' appeal to a higher state court is pending. In the meantime, FERC has scheduled a public hearing on the matter.

1. Petitioner, American Electric Power Company, Inc. ("AEP"), is a holding company of electric power utilities. The remaining six petitioners, including Kentucky Power Company ("Kentucky Power"), are operating subsidiaries of AEP. Petitioners sell electricity in seven different states. Kentucky Power sells electricity to retail customers in Kentucky and is the only petitioner subject to the jurisdiction of the Kentucky Public Service Commission.

Kentucky Power and AEP's other principal subsidiaries are parties to an Interconnection Agreement providing for sharing of their electrical generating capacity. This agreement creates a pool of electricity and permits a member utility to draw from the pool when its customer's needs exceed its own generating capacity. The Interconnection Agreement, as modified by the FERC in 1979, provides that such "deficit" members may purchase available power from the pool by the payment of an "equalization charge" to the "surplus members" based on the average embedded generation costs of the surplus members. *Ohio Power Company*, 8 FERC ¶ 61,068 (CCH) (1979) *affirmed Ohio Power Company*, v. *FERC*, 668 F.2d 880 (6th Cir. 1982).[2]

In July 1978, Kentucky Power sought permission from the Commission to acquire a fifteen percent (15%) ownership interest in two large electricity generating units then being constructed by

[2]FERC approved the payment formula proposed by AEP despite its recognition that, with the cancellation of proposed new generation facilities (including one in which Kentucky Power would have been part owner), some of the AEP operating company members of the pool would remain in a deficit position for an indefinite period. *See* 8 FERC (CCH) ¶ 61,068 at p. 61,234.

another AEP subsidiary in Rockport, Indiana. The Commission denied authorization finding that Kentucky Power could purchase any needed additional power from the pool under the Interconnection Agreement.

In 1981, Kentucky Power again sought permission from the Commission to buy a 15% interest in the Rockport facility, claiming need for more generating capacity and that the Rockport facility was the only alternative available. On August 2, 1984, the Commission again denied Kentucky Power's request. The Commission rejected Kentucky Power's contentions that it could not continue to meet its needs by purchasing capacity from the pool under the Interconnection Agreement and that the Interconnection Agreement contained an implied obligation requiring Kentucky Power to buy a 15% share of the Rockport facility.

Rather than seeking judicial review of the Commission's decision, Kentucky Power promptly entered into a new agreement (the "Unit Power Agreement") with an AEP affiliate whereby Kentucky Power agreed to buy 15% of the annual output of the Rockport facility (thus, in effect securing the 15% interest in Rockport that the Commission had precluded it from owning).

The Unit Power Agreement was then filed with FERC as a jurisdictional rate schedule for the sale of electric power in interstate commerce for resale. *See* 16 U.S.C. § 824d(c). On October 1, 1984, FERC set the filing for hearing to determine the just and reasonableness of the rates. In its hearing order the FERC ruled that the "Kentucky Commission has jurisdiction to consider the appropriateness of [Kentucky Power's] acquisition of new facilities . . . ," and that there is ". . . no overlap or conflict . . ." between the roles of the federal and state agencies. *AEP Generating Co.*, 29 FERC (CCH) ¶ 61,002 (1984). On rehearing, on November 21, 1984, FERC ruled that while it did not believe consideration of Kentucky Power's prudence in making the purchase was relevant to the proceeding it had instituted to determine whether the filed rate for the Unit Power Agreement was just and reasonable, questions of whether a utility purchaser of capacity "has purchased wisely or made the best deal available" are "legitimate concerns of the state Commissions and this Commission as well [in cases

involving the wholesale rates of the purchaser] in determining whether purchases reflect prudently incurred expenses for purposes of determining the purchasers' rates for sale to others." *AEP Generating Co.*, 29 FERC (CCH) ¶ 61,246 at p. 61,501.

2. On December 4, 1984, the Commission, in a retail rate proceeding initiated by Kentucky Power, ruled that the utility had acted imprudently in buying the Rockport unit power because it could secure the additional capacity and energy to meet its customers' demands from the Interconnection Agreement pool at an annual cost savings of $23 million.

Kentucky Power then sought judicial review of the Commission's order in the state courts. At the same time, along with the other petitioners, it sought declaratory and injunctive relief in federal district court. Kentucky Power subsequently filed a petition with FERC for a declaratory ruling that power was not available to it under the Interconnection Agreement.

The Franklin County Kentucky Circuit Court, a designated state created forum with special expertise in the public utility regulation field,[3] affirmed the decision of the Kentucky Public Service Commission on March 24, 1986.[4] The state court found, among other things, that (1) the Interconnection Agreement does not require Kentucky Power to buy power from the Rockport facility at its higher incremental price and (2) the Interconnection Agreement allows Kentucky Power to purchase needed power from the AEP pool. And, the court also held that the Commission acted within its authority in considering the prudence of Kentucky Power's purchase. Kentucky Power's appeal to the state court of appeals is pending.

In the meantime, on January 16, 1985, the federal district court, by an unpublished decision, refused to enjoin the state proceedings, electing instead to abstain in favor of the state action. It relied on *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) (Pet. App. 19a-23a).

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[3]KRS Chapter 278.410(1).

[4]A copy of the state court's decision is attached hereto for the Court's convenience (Addendum 1a-6a).

On March 24, 1986, the Sixth Circuit affirmed, holding that the district court properly abstained. The unpublished *per curiam* decision held that *Younger* v. *Harris* required abstention (Pet. App. 6a-7a). Finding that "the regulation of consumer electric rates is an important state interest," that petitioners "will have an adequate opportunity to raise their federal claims in the pending state action," and that petitioners do not "claim that the Kentucky Commission's orders are the result of bad faith or harassment," the court of appeals ruled (*id.*):

> when the regulatory activities of the state proceed to a state judicial forum, the principles of comity and federalism that underly the *Younger* doctrine come into play and the federal courts should abstain from interfering.

The *per curiam* decision rejected abstention under the *Burford* doctrine (Pet. App. 4a-6a). However, the court of appeals' panel, comprised of two circuit judges and one district judge sitting by designation, voted two to one in favor of abstention on each theory.

The court of appeals thereafter denied a petition for rehearing. No active judge of the Sixth Circuit requested a vote on the suggestion for rehearing *en banc* (Pet. App. 13a). The court of appeals also denied motions filed by petitioners and by FERC for publication of the court of appeals' decision.

On August 20, 1986, after petitioners filed their petition for a writ of certiorari, FERC ruled on Kentucky Power's petition for a declaratory ruling, which was filed on November 18, 1985. FERC's orders, attached hereto as an Addendum (pp. 7a-27a), set for public hearing the issue as to the availability of power to Kentucky Power under the Interconnection Agreement. And FERC has required its administrative law judge to render a decision within ninety (90) days.

DISCUSSION

Petitioners contend (Petition p. 8) that the lower courts' unpublished decisions present "[t]he question whether abstention

principles deprive federal district courts of authority to prevent state utility commissions from interfering with the exclusive jurisdiction of FERC" which "has become one of the most important and frequently recurring questions facing the federal judiciary." However, this case does not involve a state utility commission that has interfered with FERC in any way. Instead, FERC had expressly held that the state commission had jurisdiction to pass on the prudence of Kentucky Power's purchases under the Unit Power Agreement.[5] And all of the issues as to the alleged invalidity of the Commission's order raised by petitioners before the federal district court also were raised, and resolved against Kentucky Power, in the state court in which it also sought relief. In addition, FERC has now instituted proceedings to determine the availability of power to Kentucky Power under the Interconnection Agreement. Nor do the lower courts' unpublished decisions as to the application of the *Younger* and *Burford* abstention doctrines present any substantial questions independently justifying review by this Court, Accordingly, the petition should be denied.

1. The petition presents a misleadingly narrow recitation of the factual background. This case does not present the problem of the proper role of the federal courts where it is alleged that a state commission has refused to follow rate orders approved by FERC. Instead, we have here a petitioner that sought to have a federal district court enjoin a state commission determination that a utility seeking a retail rate increase had acted imprudently by purchasing power costing more than the alternative power available to it under another rate schedule on file with FERC. FERC fully agreed with

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[5]As indicated in the Petition, questions have also been raised in both the state and federal courts as to the part of the Commission's rate order limiting the costs of certain high voltage transmission lines constructed by Kentucky Power to be included in its retail rate base to the level the Commission found to have been incurred for the benefit of Kentucky customers. As the Franklin Circuit Court's opinion makes clear (Addendum 3a-5a), there is no merit to petitioner's suggestion that their action conflicts with a pending rate proceeding initiated by petitioner before the FERC to allocate the costs of all AEP system high voltage transmission lines among the members of the pool, under which Kentucky Power would be entitled to payments from the other members for the interstate use of its high voltage transmission facilities based on the full costs thereof. The Commission's order in no way affects the amounts Kentucky Power would be authorized to receive or retain as a result of the FERC proceeding.

the Kentucky Public Service Commission, at the time that Commission decided the prudency of Kentucky Power's purchase, that the Commission had jurisdiction to consider the appropriateness of the acquisition and that such actions did *not* conflict with FERC's authority.

The issue which the petitioners raised in the federal courts below is thus the issue expressly reserved by this Court's decision last term in *Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676, 4681 (June 17, 1986), namely whether a state commission properly may adjudicate "the reasonableness of purchasing from a particular source of, rather than paying a particular rate for, FERC-approved power."[6]

There is, therefore, no reason why this Court should now consider whether the federal courts below were correct in abstaining from entertaining petitioner's actions. Kentucky Power submitted all issues as to the prudence of its action in agreeing to the Unit Power Agreement to the Commission and, when it was unsuccessful before the Commission, sought relief in both the state and federal courts. The determination of these issues by the Kentucky state court precludes as a matter of *res judicata* or collateral estoppel relitigation of the issues in the federal courts. *Allen* v. *McCurry*, 449 U.S. 90 (1980); *Kremer* v. *Chemical Construction Co.*, 456 U.S. 461 (1982); *University of Tennessee, et al.* v. *Elliott*, 54 U.S.L.W. 5084 (July 7, 1986); *see* 28 U.S.C. § 1738; *Princess Lida* v. *Thompson*, 305 U.S. 456, 466 (1939).[7]

Even assuming further action in the federal district court is not precluded by *res judicata* or collateral estoppel, FERC has now determined that it will consider the issues petitioners sought to

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[6]"[W]ithout deciding this issue," the Court in *Nantahala Power & Light Co.* "assume[d] that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*." 54 U.S.L.W. at 4681 (emphasis in original).

[7]In Kentucky, the decision of the Franklin Circuit Court is conclusive despite the pendancy of an appeal. *Vaughn's Adm'r* v. *Louisville & N.R. Co.*, 179 S.W. 2d 441, 444 (1944); *see Deposit Bank of Frankfort* v. *City of Frankfort*, 191 U.S. 499, 511 (1903).

raise in the federal district court. Since questions as to the scope of FERC's jurisdiction to take such action and its ultimate interpretation of the Interconnection Agreement are subject to direct appeal to an appropriate federal court of appeals pursuant to 16 U.S.C. § 8251(b), there would, in any event, be no basis for federal district court intervention to consider similar issues. In short, it would in no way advance the resolution of the underlying issues in this proceeding were the Court to grant the petition and, after briefing and oral argument, conclude that the abstention determinations below were erroneous at the time they were made. In all practical terms, the abstention issue in the present case is moot.

2. Nor do the unpublished decisions of the courts below present any general issues of significance as to the application of the much litigated *Younger* and *Burford* abstention doctrines to the factual situation presented, which would conceivably warrant plenary review by this Court. On the contrary, the court of appeals' unpublished decision has little precedential value. Under Rule 24(b) of the Local Rules of the Sixth Circuit, citations of unpublished decisions are "disfavored." Further, the court's decision not to publish its opinion, notwithstanding motions for publication, certainly represents that court's view that the case is without substantial value as a precedent. The Sixth Circuit's Rules include "a presumption in favor of publication of signed and per curiam opinions" and list criteria to be considered by the court in determining whether to publish, which include all of the factors that would give an opinion precedential value.[8]

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[8]Rule 24 of the Local Rules of the Sixth Circuit states in pertinent part:

(a) Criteria for Publication.

(1) It is the policy of the court that the following criteria shall be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter:

> (i) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;
>
> (ii) whether it creates or resolves a conflict of authority either within the circuit or between this circuit and another;
>
> (iii) whether it discusses a legal or factual issue of continuing public interest;
>
> (iv) whether it is accomplished by a concurring or dissenting opinion;

There is, in short, nothing which indicates that the Sixth Circuit considers the several opinions of the panel as representing the definitive views of that circuit as to the scope of the *Younger* and *Burford* abstention doctrines to be followed by it and the circuit's district courts in other situations. And, the possibility that the panel may have erred in its application of the doctrines to the particular circumstances of this case would not itself be a basis for granting the writ even if federal issues allegedly justifying intervention by the federal courts were far more significant than actually is the case here.

3. This Court's determination in *Nantahala Power & Light Co., supra,* of the preemption issue which the Fourth Circuit had abstained from considering in *Aluminum Company of America* v. *Utilities Commission of North Carolina,* 713 F.2d 1024 (4th Cir. 1983), *certiorari denied,* 465 U.S. 1052 (1984), demonstrates that this Court's review of state court determinations of important federal-state issues can lead to an effective and expeditious resolution of such problems and that the Court's review of situations where a federal court of appeals arguably applied abstention doctrines erroneously is not necessary to ensure prompt resolution of major federal-state conflicts. And the even more recent decision of this Court in *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 54 U.S.L.W. 4860 (June 27, 1986), holding that the Sixth Circuit should have applied *Younger* and abstained from ruling on the federal issues presented in that case, since a federal

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(v) whether it reverses the decision below, unless:

(a) the reversal is caused by an intervening change in law or fact, or,

(b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

(vi) whether it addresses a lower court or administrative agency decision that has been published; or,

(vii) whether it is a decision which has been reviewed by the United States Supreme Court.

(2) Designation for Publication. There shall be a presumption in favor of publication of signed and per curiam opinions. Such opinions shall be designated for publication unless a majority of the panel deciding the case determines otherwise upon consideration of the foregoing criteria. An order shall not be designated for publication unless a member of the panel so requests.

court should not enjoin pending state proceedings "except in the very unusual situation that an injunction is necessary to prevent great and immediate irreparable injury" (54 U.S.L.W. at 4862), clearly indicates that the narrow interpretations of the *Younger* doctrine supported by petitioners here and below are not what the Court intends. Instead, the Court reiterated, with special emphasis, its statement in *Younger* that "the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions" (*ibid*, emphasis in original).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 2, 1986

ADDENDUM

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

84-CI-1760

KENTUCKY POWER COMPANY **PLAINTIFF**

v. **JUDGMENT**

KENTUCKY PUBLIC SERVICE COMMISSION, et al

This appeal is before the Franklin Circuit Court on petition of the plaintiff Kentucky Power Company for review of a rate order issued by the Kentucky Public Service Commission on December 4, 1984. The plaintiff Kentucky Power Company moved this Court for temporary injunctive relief from that order, which motion was denied on February 8, 1985. The case is now before the Court for review of the merits of the Commission's order.

FACTUAL HISTORY

This appeal is merely one installment in a rather lengthy controversy before the defendant Commission. Kentucky Power is a wholly owned subsidiary of American Electric Power Company, Inc. (AEP) and is engaged in the business of supplying electric energy to numerous Kentucky customers. The Kentucky Public Service Commission is vested by Kentucky law with jurisdiction over the company's retail rates.

AEP is a utility holding company and the parent company of numerous utility companies which provide electric energy in several States. The AEP system is a fully integrated interstate utility system.

Beginning around 1978, Kentucky Power sought permission to buy a 15% undivided ownership interest in two large electricity generating plants under construction by Indiana and Michigan Electric (another AEP subsidiary) in Rockport, Indiana. These efforts were not approved by the Public Service Commission or by the Kentucky Appellate Courts.

In September 1981, the Public Service Commission reversed itself and approved Kentucky Power's effort to purchase part of the Rockport plant. On appeal, the Kentucky Court of Appeals reversed that order of the Commission, directing the Commission to make specific findings of fact and to determine other issues. Additional hearings were held by the PSC and again in March 1983, the Commission approved the purchase of a 15% interest in Rockport by Kentucky Power. That decision by the PSC was reconsidered and new evidence was presented to the Commission. On August 2, 1984, the PSC issued a revised order reversing its previous stand and denying Kentucky Power's application to purchase the 15% share of Rockport. That order was not appealed.

Before the last decision by the PSC, Kentucky Power, Indiana and Michigan, and AEP Generating Company entered into a unit power agreement whereby Kentucky Power agreed to buy 15% of the output of Rockport; this agreement represented the financial equivalent of Kentucky Power owning 15% of Rockport. This agreement required the rate approval of the Federal Energy Regulatory Commission (FERC). FERC approved the rates, subject to refund.

As a basis for its decision the PSC had ruled that Kentucky Power could meet its capacity needs by buying surplus power available to it from the AEP power pool. This was possible because the pool had excess capacity, even without the Rockport plant. The PSC concluded that it was cheaper for Kentucky Power to purchase the needed power from the pool under the Interconnection Agreement as opposed to ownership of Rockport. The Commission found that Kentucky Power had a contractual right to purchase from the pool under the Interconnection Agreement.

On December 4, 1984, the PSC ruled that Kentucky Power acted imprudently in entering the unit power agreement to purchase 15% of the power from Rockport when the same amount of power could be purchased under the pool agreement at a substantially lower cost. This ruling was appealed to this Court.

By order of February 8, 1985, this Court denied the plaintiff Company's motion for injunctive relief on the Rockport issue.

Another issue before the Court involves the construction of a transmission line called the Hanging Rock-Jefferson Line. Kentucky Power, along with its sister companies, Appalachian Power Company, Columbus and Southern Ohio Electric, Indiana and Michigan Electric Company and Ohio Power Company, are all members of the AEP system. The AEP system is highly interconnected through utilization of transmission lines.

In 1974, Kentucky Power applied to the Commission for a certificate authorizing construction of a 155 mile transmission line in Kentucky at a cost of $55 million. The transmission line would connect the Hanging Rock substation of Ohio Power Company with the Jefferson substation of Indiana and Michigan Electric Company (Hanging Rock-Jefferson line) and would not have any outlets in Kentucky. Kentucky Power told the Commission that other members of the AEP system would pay for 95% of the line's construction, operation and maintenance costs. A certification was granted on that basis.

In 1983, Kentucky Power told the Commission that the Hanging Rock-Jefferson line would be completed in 1984 at a cost of $123 million and that none of the other members would pay for any of its costs. The Commission then initiated Case No. 8904 to investigate Kentucky Power's need for the transmission line and its cost responsibility.

During the course of that investigation the AEP system filed with the FERC a Transmission Agreement whereby AEP subsidiaries whose investment in transmission facilities was below a specified level would pay rates to those subsidiaries whose investment exceed the specified level. Pursuant to this FERC agreement, Kentucky Power's transmission investment entitles it to receive revenues from its sister utilities; there are no rates to be paid by Kentucky Power.

The Commission's order in Case No. 8904 found that while the Hanging Rock-Jefferson line did provide some reliability benefits to Kentucky Power and its customers under certain extreme conditions of low probability, it was built primarily to enable the system to transfer large quantities of power from Ohio to Indiana,

i.e., bulk power transfers in interstate markets. The Commission further found that the transmission line greatly exceeded Kentucky Power's intrastate needs and consequently, only a portion of the investment should be included in retail rate base. Utilizing an allocation formula similar to the AEP system's allocation of generating capacity under the Pool Agreement, the Commission found that only 44% of the investment in the Hanging Rock-Jefferson transmission should be included in retail rate base and only 44% of the operating and maintenance expenses should be charged to retail customers. Kentucky Power's rates in Case No. 9061 were based on the 44% limitation as ordered in investigative Case No. 8904.

FINDINGS OF FACT

(1) The AEP Interconnection Agreement does not contain any provisions that would require KPC to buy power from the Rockport plant at incremental cost for purposes of meeting Kentucky Power Company's (KPC) internal demand.

(2) The AEP Interconnection Agreement specifically allows KPC to purchase needed power from the AEP pool at the embedded cost of power generated by the pool.

(3) The record in the proceedings before the Public Service Commission clearly demonstrates that it is less expensive to purchase power from the pool than it is to purchase power pursuant to AEP's proposed unit power agreement.

(4) The Unit Power Agreement between AEP Co., and KPC is the equivalent of the purchase by KPC of 15% of the Rockport plant.

(5) In its Order of October 1, 1984, in Docket No. ER 84-579-000, the FERC found that ". . . Kentucky Commission has jurisdiction to consider the appropriateness of KEPC's acquisition of new facilities . . . ," and that there is ". . . no overlap or conflict . . ." between the regulatory roles of FERC and the Kentucky Commission.

(6) In its Order of November 23, 1984, in Docket No. ER 84-579-000, FERC found that State commissions, as well as FERC,

have legitimate concerns ". . . in determining whether purchases reflect prudently incurred expenses for purposes of determining the purchaser's rates for sales to others." FERC further found that ". . . in this proceeding, we do not intend to make or consider any findings concerning KEP Company's prudence in entering the agreement, in light of the availability of alternative power supplies."

CONCLUSIONS OF LAW

(1) PSC acted within its statutory authority in denying recovery of the Unit Power Agreement costs in light of the contractual right of KPC to purchase power at embedded cost from the AEP pool. See *K.U. v. PSC*, Ky. 252 SW 2d 885 (1952)

(2) No confiscation occurs when the PSC rejects for ratemaking purposes excessive or imprudently incurred expenses.

(3) The mere filing of a rate schedule for a Unit Power Agreement with FERC does not preempt the PSC from considering the prudence of KPC in entering into the agreement in light of alternative power supplies, and from denying recovery of excessive costs when they are imprudently incurred.

(4) FERC's interpretation of its authority under the Federal Power Act is entitled to great weight, and sufficient cause to question FERC's interpretation has not been shown.

(5) The PSC Orders complained of are not clearly in conflict with the Federal Power Act.

(6) The Commission's fixing of a value of the Hanging Rock-Jefferson line for retail rate making was just and reasonable and supported by the evidence.

(7) There has been no showing by clear and convincing evidence that the Order of the Commission was unreasonable or unlawful. The Order is supported by substantial evidence in the record.

(8) There is no evidence in the record that the rates set by the Commission are confiscatory.

JUDGMENT

WHEREFORE, the Court ORDERS AND ADJUDGES that the Order of the Public Service Commission in Case No. 9061 is hereby *AFFIRMED* and all relief sought by the plaintiffs herein is *DENIED*.

This is a final and appealable judgment and there is no just cause for delay.

SO ORDERED THIS 21 day of MARCH, 1986.

_____

JUDGE, FRANKLIN CIRCUIT COURT

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ELECTRIC RATES: Declaratory Order; Consolidation

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

Kentucky Power Company) Docket Nos. EL86-10-000 and ER84-579-006

ORDER SETTING ISSUES FOR HEARING AND CONSOLIDATING DOCKETS

(Issued August 20, 1986)

On November 18, 1985, Kentucky Power Company (KEPCO) filed a petition for a declaratory order requesting that the Commission declare the following:

> By virtue of the nature of multi-state power pools in general, and under the specific facts and circumstances that existed when KEPCO entered into the [AEP Generating Company (AEGCO)]/ KEPCO Unit Power Agreement (pending before this Commission in Docket No. ER84-579-001), the American Electric Power System (AEP System) Interconnection Agreement and the AEP System pooling arrangement as it has developed over the years did not permit KEPCO to continue to purchase additional power from the AEP System Pool at average embedded cost rates, and required KEPCO to provide capacity to the Pool, which KEPCO has done through the AEGCO/ KEPCO Unit Power Agreement for Rockport capacity.

Background

KEPCO is a wholly-owned subsidiary of American Electric Power Company, Inc. (AEP), a registered public utility holding company pursuant to the provisions of the Public Utility Holding Company Act of 1935 (PUHCA).[1]

The AEP System operates on an integrated basis pursuant to the terms of the AEP System Interconnection Agreement (System Agreement). While the individual operating companies own and operate the facilities that comprise the AEP System, the facilities are planned on a systemwide basis and operated on central dispatch, generating the lowest cost energy to meet total system load. The System Agreement provides, among other things, for payments among the operating companies to account for capacity deficiencies and surpluses. Monthly cash payments are made by those members which have a "primary capacity deficit," as defined in Article 5 of the System Agreement, to those which have a "primary capacity surplus" at a rate equal to the surplus members' cost of steam capacity.

For many years, KEPCO was a surplus member of the AEP System. However, between the 1978/79 and 1983/84 winter seasons, inclusive, KEPCO's reserve margin declined from 21.0% to −2.3%. In order to obtain capacity, KEPCO had intended to own 15% of the Rockport Generating Station and its output. The Kentucky Public Service Commission (Kentucky Commission), which regulates KEPCO's retail rates, denied the company permission to make the purchase, but then granted the request on rehearing. The Kentucky State courts reversed the Kentucky Commission's decision and remanded the matter for an additional evidentiary proceeding. On remand, the Kentucky Commission affirmed its prior order authorizing the purchase, but limited the investment which could be included in KEPCO's rate base. Subsequently, on August 2, 1984, the Kentucky Commission reversed its decision, again denying KEPCO permission to own a portion of the Rockport plant. As a result, KEPCO entered into a unit power sales agreement with AEGCO providing for the purchase of 15% of the

[1] 15 U.S.C. §§ 79, *et seq.*

output of the Rockport plant.[2] KEPCO then sought to include the costs of this power in its retail rates in lieu of its ownership participation. On December 4, 1984, the Kentucky Commission disallowed KEPCO's purchased power costs associated with the output from the Rockport plant to the extent that it exceeded the cost of power purchased from the AEP System. The Kentucky Commission held that KEPCO could acquire power sufficient to meet its needs under the terms of the System Agreement, and that such purchases would be less costly than purchasing power under the Rockport unit power sales agreement.

In Docket No. ER84-579, this Commission declined to consider the question of whether KEPCO could make purchases under the System Agreement as an alternative to the Rockport purchase. However, that decision was without prejudice to the AEP Companies' filing of a petition for a declaratory order interpreting the System Agreement. KEPCO's present petition is a result of the earlier order.

In support of its petition, KEPCO asserts that the members of the AEP System cannot simply receive the benefits of integrated operations without sharing the burdens or responsibilities. Further, the company argues that each member must supply sufficient capacity to meet its own internal demand plus an adequate reserve margin. While temporary imbalances in capacity among system members may occur, capacity equalization payments are not, KEPCO contends, a substitute for the members' meeting their obligations to provide sufficient generating capacity. The effect of the Kentucky Commission's ruling, KEPCO alleges, would be to require the AEP System to carry a capacity deficient member for an unlimited period of time. KEPCO contends that the Kentucky

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[2]That agreement was docketed as No. ER84-579-000 and filed with this Commission on August 2, 1984. By order issued on October 1, 1984, the Commission suspended the Rockport unit power sales agreement and set the matter for hearing. 29 FERC ¶ 61,002. Subsequently, on February 18, 1986, an offer of settlement was filed resolving all issues but those raised in a request for rehearing of an order issued by the Commission on September 13, 1985. 32 FERC ¶ 61,364. The offer is opposed by the Kentucky Commission. On May 30, 1986, the presiding judge certified the contested offer of settlement. By separate order, the Commission is addressing that request for rehearing.

Commission's order: (1) is contrary to the provisions of the System Agreement, particularly sections 4.2 and 5.7, and the principles which underlie pooling agreements; (2) undermines the Federal Power Act's policy of encouraging voluntary pooling agreements;[3] (3) usurps this Commission's exclusive jurisdiction over wholesale rates; (4) violates the "filed rate" doctrine; (5) results in undue discrimination against the other members of the AEP System; (6) constitutes unlawful "parochial economic protectionism" in favor of Kentucky ratepayers. KEPCO requests expedited consideration of its petition, contending that it is losing $64,000/day ($23 million/year) as a result of the Kentucky Commission's order.

Notice of KEPCO's filing appeared in the *Federal Register*,[4] with comments due, after extension, on or before December 23, 1985. Timely motions to intervene were filed by the Municipal Wholesale Electric Customers of Ohio Power Company (Municipals), the City of Westerville, Ohio (Westerville), the Old Dominion Committee for Fair Utility Rates (Old Dominion), the Attorney General of Kentucky (Kentucky Attorney General), the Indiana Municipal Power Agency (IMPA), the Indiana and Michigan Municipal Distributors Association (IMMDA), the City of Auburn, Indiana (Auburn), Wabash Valley Power Association (WVPA), and the Kentucky Industrial Utility Customers (Kentucky Industrials). In addition, timely notices of intervention were filed by the Public Service Commission of West Virginia (West Virginia Commission), the Kentucky Commission, and the Public Utilities Commission of Ohio (Ohio Commission).

The Municipals, Westerville, Old Dominion, IMMDA, Auburn, WVPA, the West Virginia Commission, and the Ohio Commission do not raise any substantive issues. IMPA requests that the Commission limit its action in this docket to an interpretation of the System Agreement and not institute proceedings pursuant to section 206 of the Federal Power Act[5] as to the justness and reasonableness of the current System Agreement.

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[3]*See* 16 U.S.C. § 824a(a).

[4]50 *Fed. Reg.* 49,094 (1985).

[5]16 U.S.C. § 824e.

The Kentucky Attorney General requests that this Commission decline to issue the declaratory order sought by KEPCO. In support, the Kentucky Attorney General states that the real issue in this case is the wisdom and prudence of KEPCO's agreement to purchase power under the Rockport unit power sales agreement filed in Docket No. ER84-579-000, that the Kentucky Commission has considered KEPCO's rights and obligations under the System Agreement in concluding that KEPCO was imprudent, and, thus, there is no need for this Commission to resolve the question presented. In the event that the Commission determines that interpretation of the AEP System Agreement requires an examination of the actual practices of the AEP operating utilities, the Kentucky Attorney General requests that the Commission set the matter for hearing.

The Kentucky Commission contends that the Commission should decline to issue an order in these proceedings. The Kentucky Commission states that its orders are currently under review in Federal[6] and State[7] court, and that judicial resolution of the controversy between AEP and the Kentucky Commission does not require reference of the matter to this agency. Rather, the Kentucky Commission argues, action by this Commission will serve to delay resolution of the issues. The Kentucky Commission denies that it has usurped this Commission's jurisdiction.

In the event that we do rule on KEPCO's petition, the Kentucky Commission argues that the System Agreement provides that KEPCO may acquire needed capacity at average rates from the other members of the AEP system, and that neither section 4.2 nor 5.7 of the agreement provides to the contrary. The Kentucky Commission characterizes KEPCO's arguments as advancing the proposition that the AEP Companies are not bound by the terms of

[6]*AEP v. Kentucky Public Service Commission*, No. 85-5129 (6th Cir.). On March 24, 1986, the Sixth Circuit affirmed a district court's refusal, on grounds of abstention, to issue an injunction directing the Kentucky Commission to implement KEPCO's requested retail rate increase.

[7]*Kentucky Power Company v. Kentucky Public Service Commission*, No. 84-CI-1760 (Commonwealth of Kentucky, Franklin Circuit Court). On March 24, 1986, the court determined that the System Agreement does not require KEPCO to purchase power under the Rockport unit power sales agreement, rather than under the former agreement, and affirmed the Kentucky Commission's decisions.

their System Agreement. The Kentucky Commission goes on to note that in *American Electric Power Service Corp.*, Opinion No. 50, 8 FERC ¶ 61,068 (1979), *aff'd sub nom. Ohio Power Co. v. FERC*, 668 F.2d 880 (8th Cir. 1982), this Commission approved a capacity equalization charge in the AEP System Agreement based on average investment costs of surplus members, as proposed by AEP, and rejected the trial staff's proposal to calculate the charge based on the costs of the specific generating unit supplying the deficient capacity, *i.e.*, an incremental cost based rate. The Kentucky Commission further argues that the AEP System Agreement does not require that the members maintain a specified amount of capacity relative to their peak requirements. If the AEP Companies are dissatisfied with the terms of the System Agreement currently on file with the Commission, the Kentucky Commission states that they may modify the agreement by filing revisions to it.

On January 9, 1986, the West Virginia Commission filed a statement in support of and adopting the arguments of the Kentucky Commission.

The Kentucky Industrials advance many of the arguments proffered by the Kentucky Commission. In particular, they dispute KEPCO's assertion that the company is obligated to maintain a specific level of generating capacity, either by building it or purchasing the capacity on an incremental cost basis, as opposed to sharing in the AEP System's total capacity and making payments to companies with surplus capacity at average cost. With respect to KEPCO's reliance on sections 5.7 of the System Agreement, the Kentucky Industrials argue that this is misplaced because the provision only covers transactions involving non-affiliated companies.

On January 7, 1986, KEPCO filed an answer to the pleadings of the Kentucky Commission and the Kentucky Industrials. KEPCO states that: (1) section 5.7 (ii) of the System Agreement specifically provides for unit power sales agreements between AEP affiliates; (2) one of the purposes of section 5.7 is to reduce long-term capacity deficits among individual operating companies on the AEP System; (3) the System Agreement embodies commitments to coordinate expansion of power supply facilities as well as system operations; and (4) the Kentucky Commission is obligated

under the "filed rate" doctrine to recognize the full costs incurred by KEPCO associated with the Rockport purchase.

On January 21, 1986, the Kentucky Commission moved that KEPCO's January 6 pleading be rejected as contrary to the Commission's Rules of Practice and Procedure. In the alternative, the Kentucky Commission sought leave to file a reply.[8] The Kentucky Commission contends that section 5.7 (ii) does not refer to either transactions between affiliates or unit sales agreements. With respect to KEPCO's "filed rate" argument, the Kentucky Commission alleges that it is empowered to examine the prudence of KEPCO's entering into the Rockport unit power sales agreement, as recognized in prior rulings by this Commission.

On March 27, 1986, KEPCO lodged copies of the decisions by the Sixth Circuit in *American Electric Power Co., Inc., v. Kentucky Public Service Commission* and the State court in *Kentucky Power Co. v. Kentucky Public Service Commission.* KEPCO states that these decisions demonstrate the urgency of Commission action on its petition for declaratory relief. On April 7, 1986, the Kentucky Commission filed a response. While not objecting to KEPCO's effort to lodge the two court decisions, the Kentucky Commission notes that the Kentucky State court has affirmed its interpretation of the System Agreement. The Kentucky Commission reiterates its view that action by this Commission on KEPCO's petition would serve only to delay, not expedite, resolution of the dispute between the company and the State commission.

Discussion

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214), the timely notices and motions to intervene serve to make the Municipals, Westerville, Old Dominion, the Kentucky Attorney General, IMPA, IMMDA, Auburn, WVPA, the Kentucky Industrials, the West Virginia Commission, the Kentucky Commission, and the Ohio Commission parties to this proceeding.

[8]On January 30, 1986, KEPCO filed an answer to the Kentucky Commission's motion to reject. KEPCO states that it does not object to the Kentucky Commission's substantive reply being considered, but insists that KEPCO's January 6 pleading is permitted by the Commission's Rules.

Pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.213(a)), KEPCO is entitled to file an answer to the motions to intervene. Accordingly, we shall deny the Kentucky Commission's motion to reject KEPCO's January 7, 1986 pleading. Further, construing KEPCO's March 27, 1986 pleading as a motion to lodge, we find good cause to grant that motion in view of the relevance of the two court decisions to this proceeding.

Notwithstanding the request of the Kentucky Commission, we shall not decline to rule on KEPCO's petition. As we explain in greater detail in a companion order also issued today in *AEP Generating Co.*, Docket No. ER84-579-005, in an integrated, affiliated power pool system, such as the AEP System, it may, in effect, be necessary for this Commission to provide its interpretation of power pool obligations and salient rate schedule provisions, where such issues are raised in the context of a jurisdictional system rate filing. An evaluation of the operations of the pool, including the members' capacity obligations and cost sharing arrangements, carries broad interstate implications which are properly considered by this agency. Our decisions regarding wholesale rate schedules, in turn, are conclusive and can compel certain subsidiary effects at the retail ratemaking level. *See Nantahala Power & Light Co. v. Thornburg*, 54 U.S.L.W. 4676 (U.S., June 17, 1986), *citing Narragansett Electric Co. v. Burke*, 119 R.I. 559 (1977). Therefore, we consider it appropriate for KEPCO to seek from this Commission an interpretation of the AEP System Agreement.

KEPCO's petition raises a number of questions involving whether the company is required under the AEP System Agreement to supply sufficient capacity to meet its native load plus a specified reserve margin and, if so, whether the company is obligated (or permitted) to meet the requirement via a unit power sales agreement rather than purchasing capacity at average cost under the terms of the System Agreement.

KEPCO cites various sections of the AEP System Agreement in support of its position, particularly sections 4.2 and 5.7.

Reviewing these two provisions,[9] we find nothing which clearly and expressly requires KEPCO to meet a specified capacity requirement or to enter into a unit power sales agreement as an alternative to purchasing system capacity. However, the AEP System Agreement does evidence an intent, as indicated in section 0.5, that the AEP Companies will engage in coordinated expansion of their power supply facilities. Section 5.7.1 recognizes, as a factor in whether purchases of capacity from non-affiliated companies should be included as primary capacity, the need of capacity-deficient members to rectify such deficiencies, and the interest of all members in maintaining an equalization among the AEP Companies of capacity resources over time. KEPCO's petition for a declaratory order alleges that the AEP Companies' practice has been to rotate generating capacity additions over time among the various members of the system. This is certainly not a unique practice among affiliated power pools, and the parties' individual obligations may not be specifically delineated in a broadly drafted pooling agreement. *See Middle South Energy, Inc., et al.*, Opinion No. 234, 31 FERC ¶ 61,305, *reh'g denied*, Opinion No. 234-A, 32 FERC ¶ 61,425 (1985). *See also* 26 FERC ¶ 63,044 (1984); 30 FERC ¶ 63,030 (1985).

While we recognize the parties' desire to expeditiously resolve their differences, in the interests of cost recovery and continued system planning, we do not believe that the issues are susceptible to summary resolution on the basis of the pleadings. However, we believe that the issues remaining for resolution, which relate to the interpretation of the AEP System Agreement itself and the conduct and practice of the AEP member companies with respect to the planning for and acquisition of capacity, can be expeditiously resolved at hearing. This interpretation would appear to comprise a discrete and primarily factual inquiry:

> Whether the System Agreement, as implemented by the AEP companies, establishes, as KEPCO asserts, an obligation on the part of member companies to supply sufficient capacity to meet

[9]The relevant provisions of the AEP System Agreement are attached in Appendix A.

> their native load requirement over time, or whether such an obligation is inherent in the nature of the AEP system here; or, on the other hand, whether the System Agreement permits a member company to become capacity-deficient, purchasing its capacity shortfall from other members under the System Agreement, on a permanent basis. Given the provisions of the System Agreement itself on this issue, its resolution requires a factual examination of the conduct and practice of member companies in implementing the capacity obligations of the Agreement since its inception. Hence, resolution of this question would appear to involve a primarily factual inquiry, which, while discrete, nevertheless requires a hearing.

As this line of inquiry does not require the presiding judge to resolve the broader, more complex jurisdictional issues presented by the filing, and as the issues relating to the System Agreement interpretation question are clearly defined, discrete and primarily factual, we believe a sufficient record can be developed for their resolution on an expedited basis. Accordingly, we shall direct the presiding judge to complete the evidentiary hearing and to issue an initial decision limited to the interpretation question within 90 days of the date of this order. Subject to this constraint, the presiding judge is, of course, free to set whatever dates he deems appropriate for the completion of discovery, the filing of testimony, the commencement of hearings, and the submission of initial and reply briefs and to take whatever measures for procedural expedition he deems appropriate.

Although the Commission previously declined to consider the matters at issue here in the earlier rate docket involving the Rockport unit power sale, (*AEP Generating Co.*, Docket No. ER84-579), we shall now consolidate these two proceedings in order to preserve all available options for future Commission. We recognize that, in consolidating Docket No. ER84-579-006 with docket other substantial issues could . However, it is not our purpose in consolidating these dockets to expand the scope of this

hearing beyond the interpretation question discussed above. We expressly reserve any future consideration of other potential issues to the Commission pending our review of the record below.

The Commission orders:

(A) The Commission hereby grants KEPCO's March 27, 1986 motion to lodge.

(B) The motion to reject KEPCO's January 7, 1986 pleading is denied.

(C) Pursuant to authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402 (a) of the Department of Energy Act and by the Federal Power Act, particularly sections 205, 206, and 306 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the interpretation of the AEP System Agreement consistent with the body of this order.

(D) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in this proceeding to be held within fifteen (15) days from the date of this order in a hearing room of the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. Such conference shall be held for purposes of establishing a procedural schedule, including the submission of a case-in-chief by KEPCO. The presiding judge is hereby directed to complete the proceeding on the interpretation of the AEP System Agreement and to issue an initial decision within 90 days of the date of this order. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) Subdocket 000 in No. EL86-10 is hereby terminated. The evidentiary hearing ordered herein is assigned Docket No. EL86-10-001.

(F) Docket Nos. EL86-10-001 and ER84-579-006 are hereby consolidated for purposes of hearing and decision.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

APPENDIX A

Selected Provisions of the AFP System Interconnection Agreement

0.5 WHEREAS, the Members through cooperation with each other have been successful for some years in achieving substantial economies in the conduct of their business by coordinating the expansion and operation of their power supply facilities.

4.2 The Members agree that their electric power sources, which shall include all the generating stations owned by the Members and all electric power available to them through interconnection with affiliated companies other than Members and Foreign Companies, shall be used as needed to carry the combined load obligations of the Members under the direction of the Pool Manager. Each Member in return shall receive at all times sufficient electric power and energy from such sources to meet the specific load obligations of such Member.

5.7 MEMBER PRIMARY CAPACITY—The aggregate capacity of the electric power sources of a particular Member, in Kilowatts, that is normally expected to be available to carry load. Such capacity shall include (i) the capacity installed at the generating stations owned by the Member and (ii) the capacity available to that Member through interconnection arrangements with affiliated companies or Foreign Companies, if so designated by the Operating Committee with approval of the Members.

5.7.1 All determinations by the Operating Committee pursuant to (ii) of Section 5.7 with respect to purchases of capacity from non-affiliated companies shall take into account, but shall not be limited to, the following circumstances and consideration: (1) the term during which such capacity will be available, a commitment from a reliable source of power and energy for at least five years being normally regarded as appropriate for inclusion as a capacity source of a particular Member, with purchases of a short or inter-

mediate duration being normally regarded as System purchases under Article 7; (2) whether the availability of the purchased capacity will be comparable to the availability of the installed primary capacity of the Members, although the Operating Committee may make adjustments in the quantity of purchased capacity to be included as Member Primary Capacity to give effect to any disparity in the availability of such purchased capacity; (3) the need on the part of a member with a Member Primary Capacity of an extended nature to rectify or alleviate such deficit and the interest of all Members in maintaining an equalization among the Members of capacity resources over a period of time.

5.7.2 In the event that arrangements are made hereunder for any Member to make capacity available to an affiliated company or to a Foreign Company through the sale of such Member, for its own account, of unit capacity or other non-firm capacity, the amount of the capacity so sold shall be excluded from the Primary Capacity of such Member.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ELECTRIC RATES: Rehearing: Jurisdiction; Prudence; Clarification

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

AEP Generating Company) Docket No. ER84-579-005

ORDER ON REHEARING

(Issued August 20, 1986)

On October 11, 1985, AEP Generating Company (AEGCO), Indiana & Michigan Electric Company (I&M), and Kentucky Power Company (KEPCO) (collectively, the AEP Companies) filed a request for rehearing of the Commission's order issued on September 13, 1985 in these proceedings. 32 FERC ¶ 61,364. By order issued on November 12, 1985, the Commission granted rehearing for the limited purpose of further consideration.

Background

The Rockport Generating Station consists of two 1300 MW units located in Spencer County, Indiana. I&M and AEGCO each own 50% of the plant. Pursuant to the terms of unit power sales agreements filed in this proceeding, AEGCO sells to I&M and KEPCO 35 percent and 15 percent, respectively, of the total capacity of Rockport Unit No. 1. By order issued on October 1, 1984, the Commission, *inter alia*, accepted AEGCO's agreements of filing, suspended them to become effective, subject to refund, on the initiation of commercial operation of the unit, and set the agreements for hearing. 29 FERC ¶ 61,002. On rehearing of the October 1, 1984 order, the Commission ruled that it did not intend to make or consider any findings concerning KEPCO's prudence in light of the availability of alternative power supplies in entering into the Rockport unit power sales agreement. 29 FERC ¶ 61,246,

p. 61,501 (issued November 23, 1984). Subsequently, on December 21, 1984, the AEP Companies filed a motion for clarification or, in the alternative, for rehearing of the November 23, 1984 order. Specifically, the AEP Companies requested that the Commission state that it would consider evidence regarding the interpretation of the AEP System Interconnection Agreement or grant rehearing insofar as it intended to preclude consideration of the AEP System Interconnection Agreement. By order issued on September 13, 1985, the Commission denied the AEP Companies' motion without prejudice to their filing a petition for a declaratory order as to the interpretation of the AEP System Interconnection Agreement.[1]

In their request for rehearing, the AEP Companies allege that the Commission erred in three respects. First, the AEP Companies assert that the Commission did not rule upon their alternative request to grant rehearing of the November 23, 1984 order in the event that the order was not interpreted in the manner proposed by the AEP Companies. Second, the AEP Companies allege that the Commission did not state with sufficient clarity its views regarding the relationship between State and Federal jurisdiction. Third, the AEP Companies contend that the Commission's ruling is inconsistent with its decision in *Middle South Energy, Inc., et al.*, Opinion No. 234, 31 FERC ¶ 61,304, *reh'g denied*, Opinion No. 234-A, 32 FERC ¶ 61,425 (1985).

Discussion

With respect to the first issue raised by the AEP Companies, they are incorrect in suggesting that the Commission did not rule upon their request, in the alternative, for rehearing in the September 13 order. The AEP Companies' motion alleged, in support of

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[1]Subsequently, on November 18, 1985, KEPCO filed a petition for a declaratory order in Docket No. EL86-10-000 requesting that the Commission interpret the AEP System Interconnection Agreement on the points raised by the AEP Companies.

their request, that the Commission erred by refusing to permit consideration of whether alternatives to the Rockport unit power sale agreement existed or to interpret the AEP Interconnection Agreement. The effect of these rulings, the AEP Companies alleged, would be that the Kentucky Public Service Commission (Kentucky Commission), which possesses jurisdiction over KEPCO's retail rates, would usurp this Commission's authority over the AEP System Interconnection Agreement (*See* Motion to Clarify Order or, in the Alternative, Application for Rehearing, pp. 13-14). In response to the AEP Companies' motion, the September 13 order specifically addressed these points and denied their motion. They are incorrect in their assertion that the Commission overlooked their rehearing request. Nonetheless, as discussed below, we are now persuaded that rehearing is warranted, to the extent of clarifying our views concerning the relationships between the AEP agreements and the appropriate interpretive role of this Commission.

In the September 13, 1985 order, the Commission discussed the respective jurisdiction of this Commission and of State commissions regarding interpretation of wholesale rate schedules. The order stated:

> We agree . . . that we do not necessarily have *exclusive* jurisdiction with respect to the interpretation of filings tendered to the Commission pursuant to the Federal Power Act. However, we also note that this Commission must have primary jurisdiction to decide questions on the interpretation and application of contracts and rate schedules within our exclusive jurisdiction. Therefore, once we have decided such a question of interpretation, a State commission is bound to follow that decision. (Emphasis supplied).

32 FERC at 61,821.

The AEP Companies allege that this passage is capable of three interpretations. First, it could be interpreted to mean that the Kentucky courts and Kentucky Commission would defer to this

Commission for an interpretation of the AEP Interconnection Agreement before they decide whether KEPCO was prudent in entering into the Rockport unit power sales agreement. Then, the State court or commission is bound to follow this Commission's interpretation. Second, the AEP Companies suggest, the Commission's order might mean that States may interpret only those portions of wholesale rate schedules and contracts which bear on local matters. Third, the September 13 order might provide that the States may interpret any portion of a wholesale rate schedule or contract, but only until this Commission speaks, at which time our interpretation would preempt the State interpretation.

The AEP Companies also contend that the Commission, in stating that interpretation of the AEP System Agreement is not relevant to the determination of the justness and reasonableness of the Rockport unit power sales agreement, has taken an overly restrictive view of its task. The AEP Companies contend that in order to find the Rockport agreement just and reasonable, the Commission must determine that a lower, embedded cost rate is not available to KEPCO. Further, the AEP Companies contend that the Commission's view is contrary to the role taken by it in Opinion No. 234. In that case, the Commission determined the proper allocation of a new plant's costs among the members of an integrated holding company system, given the history of capacity additions on the system.

Although we do not concur fully with the position of the AEP Companies, we agree, upon further reflection, that rehearing is warranted. The AEP System is an integrated public utility holding company system, organized pursuant to the provisions of the Public Utility Holding Company Act of 1935 (PUHCA).[2] Both the Rockport unit power sales agreement and the AEP System Interconnection Agreement are subject to the exclusive jurisdiction of this Commission under the Federal Power Act. Clearly, this Commission, and only this Commission, has the authority to determine just and reasonable allocations of costs and rates among the members of an integrated interstate system. *American Electric Power*

[2]15 U.S.C. §§ 79, *et seq.*

Service Corp., 32 FERC ¶ 61,363, 61,817-18 (1985); *Cf.*, *Nantahala Power & Light Co. v. Thornburg*, 54 U.S.L.W. 4676 (U.S., June 17, 1986). In Opinion No. 234, for example, we determined how the investment cost of the Grand Gulf Nuclear Unit No. 1 should be allocated among the operating utilities of the Middle South System in light of the history of plant additions and other operational aspects on the system. We believe that the present controversy is factually similar, although revisions to the AEP System Agreement are not now before us, as was the situation with respect to the System Agreement in *Middle South.*

We recognize that the November 23, 1984 order in this proceeding stated that the prudence of KEPCO's decision to enter into the Rockport agreement, in light of the availability of alternative power supplies, was not an issue. The Commission stated that it did not view its responsibilities under the Federal Power Act as including a determination that a purchaser had acted wisely, but that the question was a legitimate concern when the purchaser sought to pass through costs associated with the transaction in its rates for sales to others. 29 FERC at 61,501. Under narrow, non-pool circumstances, that view would remain sufficient and dispositive. That opinion was expressed in this case because a discrete rate filing was before the Commission, not a request to modify the broad, underlying pooling agreement. In that context, the salient inquiry was considered to be the validity of the cost support for the Rockport unit charges, not the availability of other power alternatives. Indeed, this is the typical basis for evaluating the reasonableness of a filed unit rate, since potential alternatives may exist with respect to any filed rate. The continuing controversy that has ensued, however, makes it clear that where, as here, the transaction involves affiliated, jurisdictional utilities, which are members of an integrated, interstate holding company arrangement, performing diverse functions on a coordinated basis, and particularly where differing interpretations are advocated concerning the parties' rights and obligations under the basic system agreements, the relevant issues may not be so readily segregated. Under these circumstances, more complex, interrelated questions arise and, whether one characterizes the questions as related to prudence, interpretation, or cost allocation, they are clearly matters most appropriately resolved by this Commission as part of its overriding

authority to evaluate and implement all applicable wholesale rate schedules. Given that the implications of the parties' obligations under the System Agreement have been raised in the context of determining the justness and reasonableness of the unit power sales arrangement (as well as the rates), the Commission will undertake to interpret the System Agreement in that context. Insofar as such an interpretation determines or affects the appropriateness and reasonableness of the unit power sales agreements, we consider our interpretation to be conclusive. *See Nantahala Power & Light Co., supra.*

In retrospect, it appears that the Commission could have considered questions regarding the parties' entitlements under the AEP System Interconnection Agreement in the present docket, although this inquiry would have been separate from the narrower evaluation of the cost basis for the Rockport unit power rates. However, largely at the suggestion of the Commission, KEPCO has separately requested a declaratory order concerning its ability to purchase needed capacity at average embedded cost under the System Agreement, as an alternative to the Rockport purchase, in Docket No. EL86-10-000. That proceeding now provides a suitable vehicle for considering the parties' positions regarding the capacity obligations of the system members, the availability (and appropriateness) of system power sales to KEPCO, as an alternative to a unit power purchase from Rockport, as well as any appropriate remedies.[3] A separate order addressing these questions in Docket No. EL86-10-000 is being considered concurrently by the Commission. That order will consolidate these proceedings for further Commission inquiry and any remedial action.

In light of the above, we shall clarify the September 13, 1985 order and grant rehearing as indicated in the body of this order.

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[3]We note that there are, and have been, a variety of procedural options available for a party to solicit such an interpretation. For example, the utilities or any affected State commission could have requested a declaratory order as soon as a disagreement became evident.

The Commission orders:

(A) The AEP Companies' request for rehearing is hereby granted and the Commission's order of September 13, 1985, is hereby clarified to the extent discussed in the body of this order.

(B) Subdocket 005 of Docket No. ER84-579 is hereby terminated. Further proceedings herein shall be held in Docket No. ER84-579-006.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

No. 86-49

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,
Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, et al.,
Respondents.

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,
Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, et al.,
Respondents.

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

The oppositions of the Kentucky Public Service Commission ("PSC") and Air Products and Chemical, Inc. *et al.* ("Air Products") confirm the need for Supreme Court review in this case. Indeed, their own arguments and other intervening developments vividly illustrate why it is vitally important that review of the federal abstention questions not again be evaded, only to have the questions repeated in the future. Respondents point to no case—and there is none—that will present the issues better, and any further delay in resolving the conceded eight-circuit conflict will be harmful to the nation's electric utilities, their consumers, state regulators, and FERC. This Court should now decide whether federal courts have the authority to prevent state regulatory action that interferes with federal rights under the Federal Power Act.

1. Foremost, the oppositions do not dispute that the Sixth Circuit's decision in this case squarely conflicts with decisions of at least five other circuits. They do not dispute, and cannot

dispute, that litigation of these abstention questions has exploded, and that the pervasive conflicts have arisen, in just the past three years, with new cases and abstention disputes arising constantly. The questions will generate more and more litigation and recur in many future cases between these and other parties unless they are resolved by this Court now.

Indeed, one intervening development dramatically underscores the paramount need for a decision by this Court. Since the Petition was filed, the Fifth Circuit, *sua sponte,* overruled an earlier holding that abstention is improper,[1] withdrew its opinion in a second Fifth Circuit decision that so held,[2] and issued an amended opinion in the second case. It now holds that both *Younger* v. *Harris,* 401 U.S. 37 (1971), and *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943), require federal courts to abstain from deciding whether a state utility commission's refusal to give effect to the governing FERC rate schedules in setting retail rates violates the Federal Power Act or the Commerce Clause. *See New Orleans Public Service, Inc.* v. *New Orleans,* No. 85-3654, slip op. at 2-13 (5th Cir. Sept. 2, 1986). That the Fifth Circuit would, on its own motion, overrule settled law in that Circuit and destroy reliance interests of parties (after they reached a tentative settlement) is vivid testimony to the confusion in the lower courts and the extraordinary need for a decision by this Court that will resolve what now is a five to three split in the Circuits.

Respondents, however, suggest that review is not important because the Sixth Circuit did not publish its opinion and it thus has "little precedential value." PSC, p. 8. This suggestion is ironic because the Fifth Circuit relied extensively on this unpublished opinion of the Sixth Circuit in reversing its earlier

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[1] *South Central Bell Telephone Co.* v. *Louisiana Pub. Serv. Comm'n,* 744 F.2d 1107, 1123 (5th Cir. 1984), *vacated on other grounds,* 106 S.Ct. 2884 (1986).

[2] *New Orleans Public Service, Inc.* v. *New Orleans,* 782 F.2d 1236, 1243 (5th Cir. 1986).

decision and holding that both *Burford* and *Younger* require abstention. *See New Orleans Public Service, Inc.* v. *New Orleans,* No. 85-3654, slip op. at 8-10 & nn.1&2 (5th Cir. Sept. 2, 1986). In any event, one court of appeals manifestly cannot prevent review of decisions that create conflicts by refusing to publish its opinion. This is especially so here when *eight* circuits are involved in the conflict, the questions recur constantly, and there are now inconsistent decisions and growing uncertainty even within circuits that previously decided the questions.

2. Respondents also argue (PSC, pp. 4, 6-7) that review is inappropriate because one of the petitioners (Kentucky Power) sought review of the Kentucky PSC order in the "special" Kentucky "court" that is "designated" to participate in "public utility regulation." But review cannot be evaded on this basis.[3]

To the contrary, the very question presented here is whether the pendency of state ratemaking proceedings in state utility commissions and courts can prevent federal courts from enforcing federal rights and protecting the federal regulatory scheme under the Federal Power Act. Indeed, to avoid review on the basis of pending state court proceedings would be peculiarly inappropriate because the *only* reason that any state court proceeding was instituted here is that there was such uncertainty over whether abstention principles would prevent litigation of petitioners' Federal Power Act and Commerce Clause claims in federal court.[4] For this reason, simultaneous state court review proceedings are instituted in virtually every such Federal Power Act case in which abstention is threatened

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[3] Because there were "proceedings of substance on the merits" in this federal suit before the state petition was filed, this claim is especially meritless. *Compare Hicks* v. *Miranda,* 422 U.S. 332, 349 (1975), *with* Petition for Writ of Certiorari ("Pet.") p. 7 & n.5.

[4] *Compare* Pet. p. 7 n.5, *with Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1117 (3d Cir. 1986).

or ordered.[5] In short, the fact that simultaneous state proceedings are occurring—and that there have been intervening or other decisions in them[6]—cannot be a reason for this Court to deny review. If it were, these important and recurring questions would perpetually evade Supreme Court review.

3. Finally, respondents argue that the fact that FERC has again reasserted its exclusive jurisdiction over these interstate arrangements, in its August 20, 1986 Orders (PSC, pp. 7a-27a), means that the case is "in all practical terms . . . moot." PSC, p. 8. This is nonsense. The recent FERC orders underscore that the confusion and conflicting abstention decisions are threat-

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[5] *See, e.g., Aluminum Company of America* v. *Utilities Comm'n of North Carolina,* 713 F.2d 1024 (4th Cir. 1983), *cert. denied,* 465 U.S. 1052 (1984); *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111 (3d Cir. 1986).

[6] In this regard, respondents' arguments (PSC, p. 7; Air Products, pp. 11-15) that review is inappropriate because the Kentucky Public Service Commission and the specialized Kentucky court have issued various "final decisions" construing the FERC rate schedules and that these decisions are allegedly *res judicata* in the FERC and federal court proceedings are startling. The substantive issue in this federal case is *whether* states can so invade FERC's jurisdiction or whether, in contrast, the Kentucky PSC is required by the Federal Power Act and the Commerce Clause to give effect to the Unit Power Agreement and the Transmission Agreement in its retail rate orders, *pending* a final decision by FERC. Not only are the decisions cited by the PSC (p. 7) inapposite—as even the PSC suggests (pp. 7-8)—but the question of the *res judicata* effect of the state agency's and specialized court's ratemaking determinations (which are "legislative" in character) could not even be raised until the threshold abstention issues are decided.

Finally, even if it were clear that *res judicata* could be a defense here, principles of mootness would not prevent review of the abstention questions in this case. These questions have recurred, and will recur, between these and other parties. Because intervening state utility or judicial ratemaking determinations will inevitably occur before these abstention questions can reach this Court, they will always evade review if they are not decided now.

ening the interstate power system and the regulatory scheme of the Federal Power Act and demonstrate that a national decision by this Court is urgently needed now.

The overriding fact is that the two FERC rate schedules that the PSC ignored—the Unit Power Agreement and the Transmission Agreement—are both indisputably "filed rates." Petitioner's substantive federal claim in this case is identical to the claim raised in *Nantahala Power & Light Co.* v. *Thornburg,* 54 U.S.L.W. 4676 (June 17, 1986): that the Kentucky PSC was obligated, from the date that these rate schedules became effective, to include all the resulting costs in Kentucky Power's retail revenue requirements and rates, subject to *future* refund only in the event that FERC *thereafter* decided that these "filed rates" were not just and reasonable.[7] Because the federal court abstained, however, the Kentucky ratemaking authorities have been able (on what petitioners regard as patently frivolous grounds which FERC has now rejected[8]) to exclude over $47 million from Kentucky Power's rates and revenues over the past two years—with the amount of the "trapped costs" increasing by over $64 thousand each day. The question presented here is whether utilities have a federal court remedy to prevent state ratemaking authorities from delaying rate increases until FERC exercises its jurisdiction and affirmatively rejects the state's objections—and to assure that state agencies do not thereby

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[7] *See also Narragansett Elec. Co.* v. *Burke,* 119 R.I. 559, 381 A.2d 1358, 1363 (1977), *cert. denied,* 435 U.S. 972 (1978).

[8] The Kentucky authorities previously justified their actions by claiming that this is a case like *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n.,* 77 Pa. Commw. 268, 273-74, 465 A.2d 735, 737-38 (1983). *See* PSC, pp. 3-4; Air Products, pp. 10-11. There, the state commission order was affirmed on the ground that it did not reallocate power supplies and their costs between different states, but merely ruled on the local company's "prudence" in purchasing power from an affiliate rather than cheaper power from

(Footnote continued on following page)

stand the filed rate doctrine and the federal regulatory scheme on its head.[9] The fact that FERC is now conducting proceedings cannot prevent review of *this* federal claim even if one assumes that the Kentucky authorities will hereafter obey an explicit FERC order rejecting the state's position (*but see Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676 (June 17, 1986)). If these federal claims could be so easily mooted, their repetition and continued evasion of review would be not only possible, but inevitable, and the implementation of the principles of *Nantahala* would be impeded.

(Footnote continued from preceding page)

a nonaffiliate. Whether states have even this authority is a substantial federal question that federal courts must ultimately decide. *Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676, 4681 (June 17, 1986) (reserving decision on this issue).

However, here, there is no cheaper power outside the American Electric Power Pool and the issue is how the costs of its power should be allocated among utilities in different states. The states are preempted from making this determination generally (*see Nantahala Power & Light Co., supra*, 54 U.S.L.W. at 4681-82). Ironically, the PSC and Air Products defend the PSC's actions by claiming (erroneously) that FERC previously disclaimed jurisdiction over "prudence" issues and authorized inconsistent state regulation. PSC, pp. 3-4, 6; Air Products, pp. 2, 6, 10-11. However, the PSC and Air Products ignore that FERC's August 20, 1986 Orders clarified any arguable ambiguity in FERC's earlier orders and flatly rejected the PSC's position.

[9] Thus, the arguments of Air Products (p. i) that "there was not a colorable preemption claim at the time of the federal district court decision" is a curious one. The preemption claim here is identical to that which this Court unanimously accepted in *Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676 (June 17, 1986). *See* p. 5 & n.8, *supra*.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether a federal court should abstain from adjudicating a claim, brought by a public utility against a state public utility commission, that the state commission is unlawfully refusing to honor terms filed with or fixed by the Federal Energy Regulatory Commission for the interstate sale of electric power at wholesale, in violation of the "filed rate doctrine."

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This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

This case presents the question whether a federal court should abstain from hearing a claim that a state public utility commission is violating the Federal Power Act, 16 U.S.C. 824 *et seq.*, by preventing a public utility from reflecting in retail electric rates certain wholesale costs provided in agreements filed with the Federal Energy Regulatory Commission. Petitioners base their preemption claim on the "filed rate doctrine," under which a state commission is bound to honor interstate wholesale rates for the sale of electric energy that have been filed with or fixed by the Commission (see *Nantahala Power & Light Co.* v. *Thornburg*, No. 85-568 (June 17, 1986),

slip op. 8). As explained in a memorandum we filed with this Court on November 6, 1986, in another case pending on a petition for a writ of certiorari, *New Orleans Public Service, Inc.* v. *City of New Orleans*, No. 86-546 (*NOPSI*), the legal issue raised in this case (No. 86-49) (*AEP*) is similar to that raised in *NOPSI*.[1] For this reason, we concluded that it would be appropriate while expressing our views in response to the Court's invitation in No. 86-49 also to address which, if either, of the two cases presents the question in an appropriate posture for the Court's review. Accordingly, the facts of both cases are set out separately following a brief review of the relevant statutory framework.

A. The Federal Power Act And The Filed Rate Doctrine

The Federal Power Act, 16 U.S.C. 824 *et seq.*, gives the Federal Energy Regulatory Commission exclusive regulatory authority over the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce. FERC is responsible for ensuring that all rates or charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy in interstate commerce are "just and reasonable" (16 U.S.C. 824d(a)). Public utilities are required to file with FERC schedules setting forth their rates and charges within its jurisdiction (16 U.S.C. 824d(c)), and when a public utility seeks to change a rate or charge within FERC's jurisdiction, the utility must file with FERC a new schedule that explains the changes and their effective dates (16 U.S.C. 824d(d)). FERC may hold a hearing on the lawfulness of the filed rate or charge and, pending its decision, may suspend the filed rate or charge for up to five months. FERC may require the public utility to refund, with interest, the excess amounts received should the rate go into effect and subsequently be deemed unlawful (16 U.S.C. 824d(e)). If

[1] That memorandum was served upon all parties in both cases.

FERC determines that any rate or charge collected by any public utility is unlawful, FERC is authorized to determine and to fix prospectively a "just and reasonable" rate or charge (16 U.S.C. 824e).

Under the "filed rate doctrine" established in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), a public utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission [FERC] and not even a court can authorize commerce in the commodity on other terms" (*id.* at 251). One generally accepted consequence of the filed rate doctrine, explained by this Court in *Nantahala*, is that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price" (slip op. 11). This follows from the fact that "[o]nce FERC sets such a [wholesale] rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable" (*id.* at 13). Finally, the Court held in *Nantahala* that the filed rate doctrine "is not limited to 'rates' *per se*" (*ibid.*), but also applies to contractual allocations of power, filed with FERC, that similarly affect a utility's costs: a state utility commission "cannot substitute its own conception of what allocation of [low cost] power would have been * * * fair" (*id.* at 15).

B. Proceedings Below in No. 86-49

Petitioner American Electric Power Company, Inc. (AEP) is a fully integrated public utility holding company established under Title I of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79 *et seq.* AEP owns eight operating electric utility companies, which serve consumers in seven states. Five of the eight operating companies, including Kentucky Electric Power Company, own major generating facilities and are interconnected by extra-high-voltage transmission lines, forming the AEP power pool, which allows the five member companies to exchange and to sell power among them-

selves and with outside companies. The power exchanges and sales are wholesale transactions that are governed by contracts and rate schedules subject to FERC's exclusive regulatory jurisdiction under the Federal Power Act, 16 U.S.C. 824d, 824e.

Since 1951, the general rights and responsibilities of the member companies of the AEP pool have been set forth in the "Interconnection Agreement" entered into by the companies and approved by FERC. The Interconnection Agreement provides for central coordination and dispatch of the generating capacity of the member companies and of capacity available from others. The Agreement provides for payments by those member companies that have a "capacity deficit" (*i.e.*, the company's generating capacity is less than its pro rata share of system demand for power) to those member companies that have a "capacity surplus" (*i.e.*, the company's generating capacity is greater than its pro rata share of system demand for power). The payments are designed for "deficit" members partially to compensate "surplus" members for the latters' excess capacity.

1. In 1974, Kentucky Power applied to the Kentucky Public Service Commission for a certificate of public convenience and necessity to construct a high voltage transmission line (the "Hanging Rock-Jefferson" line) at an estimated cost of $55 million (KPSC Br. in Opp. App. 3a). In 1978, Kentucky Power applied to the Kentucky Commission for permission to purchase a 15 percent ownership interest in a generating facility in Rockport, Indiana owned by another AEP member company, Indiana & Michigan Electric (I&M) (*id.* at 1a). After initially approving the purchase, the Kentucky Commission reconsidered its initial decision, reversed itself, and denied Kentucky Power's application on August 2, 1984 (*id.* at 2a). The Commission concluded that the purchase would be imprudent because Kentucky Power could meet its load obligations less expensively by purchasing power through the AEP power pool, pursuant to the Interconnection Agreement (*ibid.*).

In 1984, the AEP member companies, including Kentucky Power, filed two agreements with FERC. The first, a "Transmission Agreement," filed in March 1984, generally provides that AEP member companies in a "deficit" posture regarding investment in transmission facilities must make payments over a five-year period to those members in a "surplus" posture until each company is bearing its share of the total investment in transmission facilities (KPSC Br. in Opp. App. 3a). The second, a "Unit Power Sales Agreement," filed on August 2, 1984, anticipated the Kentucky Commission's adverse determination that same day of Kentucky Power's application to purchase 15 percent of the Rockport generating facility. Under the Unit Power Sales Agreement, Kentucky Power agreed to purchase 15 percent of that facility's output for up to twenty years (Pet. App. 15a). Kentucky Power subsequently applied to the Kentucky Commission for rate increases based on both its absorption of the costs of the Hanging Rock-Jefferson transmission line pursuant to the Transmission Agreement and its power purchase pursuant to the Unit Power Sales Agreement.

While Kentucky Power's application for a rate increase was pending before the Kentucky Commission, FERC undertook its preliminary review of both the Unit Power Sales Agreement and the Transmission Agreement. On August 21, 1984, FERC accepted the Transmission Agreement for filing, gave the Agreement an effective date of January 22, 1985, and postponed final approval of the agreement pending further review. *American Electric Power Service Corp.*, 28 F.E.R.C. ¶ 61,228 (1984). On October 1, 1984, FERC accepted the Unit Power Sales Agreement for filing and allowed it to take effect after a brief suspension period, subject to refund upon further review. *AEP Generating Co. (AEPGCo.)*, 29 F.E.R.C. ¶ 61,002. FERC then stated its preliminary view that the rates reflected in the Unit Power Sales Agreement might be unjust, unreasonable, unduly discriminatory, preferential, or otherwise unlawful.

On December 4, 1984, the Kentucky Commission acted on Kentucky Power's application for a rate increase and

granted only a partial increase. The Commission concluded that Kentucky Power acted imprudently in entering into the Unit Power Sales Agreement because the cost of power under that Agreement substantially exceeded the cost of purchasing power through the Interconnection Agreement. Accordingly, the Kentucky Commission concluded, Kentucky Power's rate increase should be based on the cost of purchasing additional power through the Interconnection Agreement and not on the cost of additional power under the Unit Power Sales Agreement. Pet. App. 16a. The Kentucky Commission also granted Kentucky Power only part of the rate increase it had sought based on the costs of the Hanging Rock-Jefferson transmission line under the AEP Transmission Agreement. The Commission determined that Kentucky customers benefited from only a portion of the transmission line and therefore should pay only for their fair share. The Commission found that only 44 percent of the investment should be included in Kentucky Power's rate base and only 44 percent of the operation and maintenance expenses should be charged to retail customers. KPSC Br. in Opp. App. 4a.

2. On December 12, 1984, petitioners filed this action in federal district court. Petitioners' complaint alleged that the Federal Power Act preempts the Kentucky Commission's order because the order failed to give full effect to the Unit Power Sales Agreement and Transmission Agreement on file with FERC. Eight days after the complaint was filed in federal court, petitioner Kentucky Power filed a petition in Kentucky state court for review of the Kentucky Commission's order. The state court complaint included the same federal preemption claim.

On January 16, 1985, the federal district court dismissed petitioners' complaint (Pet. App. 15a-23a). The court held that the Johnson Act, 28 U.S.C. 1342, did not bar this suit for injunctive relief, but that federal court abstention was appropriate under *Younger* v. *Harris*, 401 U.S. 37 (1971), in deference to the parallel proceeding brought by Kentucky Power in state court, and under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), be-

cause the federal action threatened to interfere with Kentucky's "overriding interest in regulating the retail rates charged by public utilities" (Pet. App. 21a-23a).

On September 13, 1985, while this case was pending before the United States Court of Appeals for the Sixth Circuit and prior to the state court's disposition of Kentucky Power's state complaint, FERC issued two orders regarding the two agreements at issue in this case. On September 13, 1985, FERC asserted that it had exclusive authority to determine the prudence of Kentucky Power's participation in the Transmission Agreement, particularly the Agreement's provision that equalization among the members would be phased in over a five-year period rather than immediately. See *AEP Service Corp.*, 32 F.E.R.C. ¶ 61,363, at 61,818 (1985). FERC also clarified an earlier order concerning the Unit Power Sales Agreement by explaining that FERC possessed "primary jurisdiction" to interpret agreements filed with it, which meant, FERC explained, that once FERC had announced an interpretation of an agreement, a state public utility commission was bound to follow that interpretation. *AEPGCo*, 32 F.E.R.C. ¶ 61,364, at 61,821 (1985).[2] Kentucky Power responded to the clarification by filing with FERC a petition for a declaratory order as to the meaning of the Unit Power Sales Agreement and the Interconnection Agreement.

On March 21, 1986, the state court affirmed the Kentucky Commission order in all respects (KPSC Br. in

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[2] In its October 1984 order, FERC had stated that there was "no overlap or conflict" between the KPSC's "jurisdiction to consider the appropriateness of KEPCO's acquisition of new facilities [or] power supply alternatives that might be available to KEPCO," and FERC's "independent responsibility to evaluate the reasonableness of the proposed wholesale agreements" (29 F.E.R.C. at 61,003). In November 1984, FERC clarified its October order by stressing that FERC *could* consider the prudence of KEPCO entering into the Unit Power Sales Agreement in the context of a proceeding concerning KEPCO's wholesale rates, but would not do so in this proceeding, which was confined to the narrow issue of the justness and reasonableness of this particular agreement. *AEPGCo*, 29 F.E.R.C. ¶ 61,246, at 61,501.

Opp. App. 1a-6a). The court specifically found that the Interconnection Agreement did not require Kentucky Power to buy power from the Rockport Facility but rather allowed Kentucky Power to meet its need by purchasing less costly power from the AEP power pool (*id.* at 4a). The court also ruled that the Kentucky Commission's order was within its statutory authority, not preempted by federal law, and adequately supported by the evidence (*id.* at 5a). Kentucky Power's appeal is currently pending before the Commonwealth of Kentucky Court of Appeals.

3. Three days later, the Sixth Circuit affirmed the United States district court's dismissal of petitioner's complaint (Pet. App. 1a-12a). In an unpublished per curiam opinion, the court held that *Burford* abstention was not appropriate, but that *Younger* abstention was warranted (*id.* at 1a-7a). In separate concurring opinions, however, two judges stated that abstention was appropriate under *Burford* (*id.* at 7a-12a).

4. On August 20, 1986, FERC issued one order granting petitioner AEP's request for a rehearing of FERC's October 1984 order and a second order agreeing to rule on Kentucky Power's November 1985 petition that FERC issue a declaratory order regarding Kentucky Power's rights and responsibilities to purchase power under the Interconnection Agreement and the Unit Power Sales Agreement. See *AEPGCo*, 36 F.E.R.C. ¶ 61,226 (KPSC Br. in Opp. App. 21a-27a); *Kentucky Power Co.*, 36 F.E.R.C. ¶ 61,227 (KPSC Br. in Opp. App. 7a-20a). In the first order, FERC clarified its earlier statements regarding the authority of the Kentucky Commission to interpret the meaning of the two agreements. FERC stated that it possessed exclusive authority to determine the just and reasonable allocation of costs and rates among members of an integrated interstate system. FERC also concluded that although normally justness and reasonableness may be determined by the Commission apart from prudency in terms of availability of alternative supplies, "where, as here, the transaction involves affiliated, jurisdictional utilities, which are mem-

bers of an integrated, interstate holding company * * *, the relevant issues may not be so readily segregated [and] are * * * matters most appropriately resolved by this Commission as part of its overriding authority to evaluate and implement * * * wholesale rate schedules" (KPSC Br. in Opp. App. 25a-26a). In its second order, FERC set issues concerning the meaning of the two agreements for hearing.[3]

On March 12, 1987, FERC issued its decision. *AEPGCo*, 38 F.E.R.C. ¶ 61,243. FERC determined that Kentucky Power did not have the option under the Interconnection Agreement to continue purchasing power from the pool (slip op. 13-17). According to FERC, the Interconnection Agreement obliges each participant to bear its fair share of the system-wide investment in capacity (*id.* at 11-13), and Kentucky Power therefore is obliged to purchase a portion of the output of the Rockport facility (*id.* at 13-22). FERC also concluded that the Kentucky Public Service Commission lacked jurisdiction to inquire whether Kentucky Power acted prudently in purchasing power from the Rockport facility (*id.* at 23-25).

C. *NOPSI*, No. 86-546

New Orleans Public Service, Inc. (NOPSI) is one of four operating electric utility companies which are wholly-owned subsidiaries of Middle South Utilities, Inc. (MSU), an integrated public utility holding company established, like AEP, under the Public Utility Holding Company Act, 15 U.S.C. 79 *et seq.* The other subsidiary operating companies, each of which sells electric power at retail to its own local customers, are Louisiana Power & Light (LP&L), Mississippi Power & Light (MP&L), and Arkansas Power & Light (AP&L). A generating subsidiary, Middle South Energy (MSE), was formed to own and finance two nuclear power plants, Grand Gulf 1 and 2, and to sell power from those plants to the operating companies.

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[3] On October 22, 1986, FERC approved a settlement of all issues relating to the Unit Power Sales Agreement, except for jurisdictional issues. *AEPGCo*, 37 F.E.R.C. ¶ 61,044.

1. In June 1985, FERC approved wholesale rates for the power from Grand Gulf 1 and allocated its capacity costs and energy among the four operating companies. *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305, on reh'g, 32 F.E.R.C. ¶ 61,425, aff'd, *Mississippi Industries* v. *FERC*, 808 F.2d 1525 (D.C. Cir. 1987). FERC concluded that the operating companies should share in the system's total investment in nuclear capacity (four units, including Grand Gulf 1) "roughly in proportion to each company's share of system demand" (*id.* at 61,655-61,656).[4] FERC ordered the following allocation of Grand Gulf 1 costs: AP&L, 36 percent; LP&L, 14 percent; MP&L, 33 percent; and NOPSI, 17 percent (*ibid.*).[5] MSE has accordingly billed NOPSI for 17 percent of the costs ($15.5 million per month) since Grand Gulf 1 went into service on July 1, 1985 (Pet. App. A2).

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[4] FERC's ruling rested on two factual findings. First, FERC found that "the Middle South companies constitute a highly coordinated integrated electric system," which historically had "roughly equalized" generating costs among the four operating companies (31 F.E.R.C. at 61,645, 61,654). Second, FERC found that Grand Gulf 1 was part of a reasonable system plan to diversify the fuel base by developing nuclear power to meet anticipated growth in demand (*id.* at 61,651-61,653, 61,656).

[5] The fixed costs associated with Grand Gulf 1 are substantially higher per kilowatt than the costs of other power generated by the MSU system (with the exception of one other new nuclear unit). In *Mississippi Industries*, the District of Columbia Circuit considered and rejected contentions by entities representing each of the four service areas that FERC had allocated too large a share to its utility. In addition, the right of each of the four utilities to pass through its share of the FERC allocated costs to its retail ratepayers has been challenged in state proceedings. In addition to the two proceedings giving rise to No. 86-546 (*NOPSI*), see *Mississippi* v. *Mississippi Public Service Comm'n*, No. 56,762 (Miss. Sup. Ct. Feb. 25, 1987) (MP&L) (86-546 Pet. Second Supp. Br. App. 1a-27a); *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), cert. denied, No. 85-895 (Jan. 27, 1986) (AP&L); *Louisiana Power & Light Co.* v. *Louisiana Public Service Comm'n*, No. 292,026 (19th Jud. Dist., Parish of East Baton Rouge, La., Oct. 9, 1985) (LP&L).

The City Council of New Orleans regulates NOPSI's retail rates. On May 17, 1985, NOPSI applied for a retail rate increase to reflect the Grand Gulf 1 costs that it would be required to pay under the FERC allocation (Pet. App. A37). On May 23, 1985, the Council established minimum standard filing requirements for rate applications and notified NOPSI that it must comply with these requirements (Resol. R-85-296). By letter dated June 6, 1985, NOPSI sought a waiver of the new filing requirements, which the Council denied on June 27, 1985 (Resol. R-85-373). At that time, the Council stated that it could not give consideration to NOPSI's rate relief request absent the information required by the new application requirements and invited NOPSI to make a more narrow waiver request. NOPSI made such a request, by letter dated July 5, 1985, which the Council denied on July 25, 1985 (Resol. M-85-326).

On July 17, 1985, the Council acted on NOPSI's request (dated June 5, 1985) that the Council authorize the sale of securities in the aggregate principal amount of up to $100 million (Resol. R-85-346A). The Council authorized NOPSI to issue and sell securities in the aggregate principal amount of up to $60 million, but it imposed several conditions, including that (1) NOPSI must make every reasonable effort to recover from MSE the $32 million NOPSI had advanced to MSE for Grand Gulf 1 to the extent that the amount reflects more than 17 percent of the costs of the plant, and (2) the proceeds from the issuance and sale of securities may not go to pay any obligations arising out of Grand Gulf 1. On that same day, the Council also announced a public hearing, to be held on July 25, 1985, to consider whether interim rate relief for NOPSI was warranted (Resol. R-85-423). The Council stated that the issue of interim rate relief needed to be addressed because "various factors, including questions as to the legality and prudency of the [contracts relating to Grand Gulf 1], the prudency and reasonableness of said expenses, and lack of information on certain relevant matters, prevent the Council

from either denying or granting the requested rate relief at the present time" (*ibid.*).

2. On August 2, 1985, NOPSI filed a complaint in federal district court seeking declaratory and injunctive relief, and money damages. NOPSI asked the court, inter alia, to issue preliminary and (later) permanent injunctions enjoining the Council from denying NOPSI recovery through the retail rates filed by NOPSI of its FERC-allocated share of the expenses of Grand Gulf 1, which NOPSI was required to pay on a monthly basis beginning July 1985. On August 12, 1985, the district court denied NOPSI's motion for a preliminary injunction without prejudice (Pet. App. A38). The court also directed (*ibid.*) the Council to take action by September 5, 1985, on a request to be filed by NOPSI for interim rate relief; NOPSI filed such a request on August 19, 1985, asking, inter alia, for an emergency increase in electric rates of approximately $168 million per year (reflecting full recovery of NOPSI's Grand Gulf 1 related expenses).

The Council denied the requested rate increase on September 5, 1985 (Resol. R-85-526). The Council instead froze NOPSI's rates, including its fuel adjustment level, and lifted some of the restrictions imposed by the Council in July 1985 on NOPSI's issuance of securities (*id.* at 4-14). According to the Council, the rate freeze would save NOPSI approximately $28.3 million over a 10-month period because the lower fuel costs of Grand Gulf 1 would, absent the freeze, have required a rate decrease (*id.* at 13). Finally, the Council stated that "[i]f the amount of permanent rate relief ultimately allowed is greater than the amount collected through the interim rates, [NOPSI] shall be allowed to recover those additional amounts, with interest, in the future" (*id.* at 12). The Council based its conclusion that this interim relief would be adequate to maintain NOPSI's solvency largely on its assumptions that NOPSI would omit dividend payments on common stock to MSU and would be repaid the excess payments it had made to MSE with respect to Grand Gulf 1, and that the Securities and Exchange Commission would allow NOPSI to issue $35 million in securities (*id.* at 3, 7, 9).

The Council stated that NOPSI could submit a supplemental application for emergency relief if the SEC did not approve the sale of securities (*id.* at 9).[6]

On September 16, 1985, the district court granted the Council's motion to dismiss (Pet. App. A35-A50). The court held that dismissal was appropriate both under the Johnson Act, 28 U.S.C. 1342, and under *Burford.* The court specifically rejected NOPSI's claim that "its insolvency is imminent due to the Council's refusal to grant sufficient emergency interim rate relief" (Pet. App. A46). According to the court, "the September 5th [City Council] resolution reveals that the Council is determined to assist NOPSI in maintaining a positive cash position by pursuing a number of feasible alternatives" (*ibid.*). Finally, the court stated that *Burford* abstention was appropriate because NOPSI's rate increase is a "matter[] which generate[s] local concern and demand[s] local administrative expertise" and "the actions of the Council address only retail, intrastate rates, and such actions have not directly conflicted with FERC's order" (*id.* at A48-A49).[7]

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[6] On August 5, 1985, the Securities and Exchange Commission had reduced by more than one half the value of a securities issue proposed by NOPSI on the ground that:

> NOPSI's financial resources continue to be severely limited and its liquidity and financial condition impaired. * * * There can be no assurance that retail rate relief [for Grand Gulf 1] will be granted on an adequate basis. The timing of rate relief is becoming increasingly important since [Grand Gulf 1] went into commercial operation on July 1, 1985. In addition, NOPSI's deteriorating financial position has led to the downgrading of its first mortgage bonds and preferred stock by a national securities rating agency to a speculative grade.

New Orleans Public Service Inc.; *Middle South Utilities Inc.*; *Proposal To Issue and Sell First Mortgage Bonds and Preferred Stock*; *Exception from Competitive Bidding*, 50 Fed. Reg. 32669 (1985).

[7] On October 10, 1985, the City Council granted NOPSI's request for reconsideration of the Council's interim relief order in a few limited respects and denied the request in all other respects (Resol. R-85-635). In support of its denial, the Council mentioned that its

3. On February 14, 1986, the court of appeals reversed (Pet. App. A1-A13). The court first concluded that the Johnson Act did not apply because petitioners' request for injunctive relief rested on a "statutorily-based preemption claim" and therefore did not rest solely on the " 'repugnance of the order to the Federal Constitution,' " within the meaning of the Johnson Act (*id.* at A12 (quoting 28 U.S.C. 1342)). The court similarly concluded that *Burford* abstention was inappropriate where, as in this case, "the claim is predicated on federal preemption" (Pet. App. A13).

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own prudence review and its challenge to FERC's determination (in the United States Court of Appeals for the District of Columbia Circuit) might decrease NOPSI's recovery (*id.* at 3). On October 11th, NOPSI filed its completed rate relief application forms consistent with the Council's new filing requirements. On October 17th, the Council announced that it would conduct a prudence investigation into NOPSI expenditures on Grand Gulf 1 and requested that NOPSI answer a lengthy series of questions posed by the Council concerning prudence (Resol. R-85-636). In describing the investigation, the Council stated that it would consider NOPSI's assessment of its need for Grand Gulf 1's capacity, its consideration of generation alternatives, its failure to diversify its fuel sources, and the extent to which its decisions were controlled by outside interests. The Council also maintained that it "[would] not seek to invalidate any of the agreements surrounding Grand Gulf 1 or to order NOPSI to pay MSE a rate other than that approved by the FERC" (*id.* at 4). On November 11, 1985, NOPSI filed a second lawsuit in federal district court in which it sought to enjoin the City Council's prudence investigation. NOPSI subsequently amended the complaint to seek an injunction or a declaratory judgment only to the extent that the Council takes any action to require NOPSI or its shareholders to absorb all or a portion of the cost of Grand Gulf 1 allocated to NOPSI by FERC. On December 18, 1986, the district court dismissed the complaint. *Middle South Energy* v. *The Council of New Orleans*, No. 85-5273 (E.D. La. Dec. 18, 1986) (Pet. Supp. Br. App. B1-B9). The court ruled, first, that NOPSI's claims were not ripe because "it is not clear whether the Council intends to proceed in a manner contrary to [this Court's decision in] *Nantahala*" (Pet. Supp. Br. App. B6). The court stressed that "there is little or no hardship to NOPSI in postponing review" (*ibid.*). The court next ruled, in the alternative, that both *Younger* and *Burford* abstention were appropriate (*id.* at B6-B8).

4. On March 20, 1986, the Council and NOPSI entered into a settlement agreement with respect to the treatment of Grand Gulf 1 costs (Resol. R-86-112). The agreement set out in detail the amounts by which NOPSI could increase its rate base annually until the costs of Grand Gulf 1 were fully recovered. Pursuant to the agreement, NOPSI also agreed permanently to absorb $51.2 million of the costs. Both sides purported to reserve all their legal rights, including the Council's right to continue to investigate prudence (see note 7, *supra*) and the possibility of municipalization,[8] and both NOPSI's and the Council's right to continue to seek judicial review of FERC's allocation order (*id.* at 11-13).

5. On June 10, 1986, the court of appeals notified the parties that it was reconsidering (on its own motion) its ruling on the abstention issue and requested briefs from the parties. On September 2, 1986, the court of appeals reversed itself on the abstention issue (Pet. App. A14-A24). The court concluded that *Burford* abstention was appropriate because "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise" (*id.* at A19). The court also held that *Younger* abstention was appropriate because there was an ongoing administrative proceeding before the Council: "NOPSI would have a full and fair opportunity to litigate its federal claim" through the state appellate process, and there were no exceptional circumstances, such as bad faith or harassment, present that rendered abstention improper (*id.* at A21-A24). Finally, the court noted that because "the Council at the time NOPSI sought injunctive relief from the district court had not yet taken any definitive action on NOPSI's May 17, 1985 rate increase application," NOPSI's claims should receive "special skepticism" (*id.* at A24 n.3).

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[8] The Council had also been considering a municipal takeover of NOPSI as a means of avoiding Grand Gulf 1 costs. See *NOPSI* v. *City of New Orleans*, 800 F.2d 488 (5th Cir. 1986).

DISCUSSION

The petitions in *AEP* (No. 86-49) and *NOPSI* (No. 86-546) both raise an important question concerning the application of *Burford* and *Younger* abstention to a claim that the Federal Power Act bars a state public utility commission from refusing to honor a utility's power costs, under agreements filed with FERC, in setting that utility's retail rates. The decisions of the Sixth Circuit in *AEP* and the Fifth Circuit in *NOPSI*, which upheld dismissals of complaints on abstention grounds, conflict with decisions of other courts of appeals, and we believe they are incorrect. To provide a neutral federal administrative forum to resolve the often conflicting interests of different states, Congress gave FERC exclusive jurisdiction over the terms of sale of power at wholesale in interstate commerce, including the terms of agreements allocating particular power among members of an interstate utility system. A state may not exercise its jurisdiction over retail sales to prevent a utility from recovering power costs incurred pursuant to such a FERC-filed agreement. See *Nantahala Power & Light* v. *Thornburg*, No. 85-568 (June 17, 1986), slip op. 18-19. Where, as in *AEP* and *NOPSI*, the federal plaintiff claims that a state public utility commission order improperly "traps" such costs, abstention is not appropriate under either *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) or *Younger* v. *Harris*, 401 U.S. 37 (1971). The independent interest of any single state in such an inherently interstate controversy is not sufficient to justify denying the federal plaintiff the choice of a federal judicial forum.

We do not urge the Court to grant review in *AEP* to consider the abstention question. The peculiar circumstances of *AEP*, including the existence of a final decision in a parallel state court proceeding, diminish its attractiveness as a vehicle for this Court to address the abstention question. We urge the Court to grant review instead in *NOPSI*, which raises the same general legal issue in a more appropriate procedural setting, and to hold *AEP* for possible further consideration in light of the decision in *NOPSI*.

1. The decisions of the Sixth Circuit in *AEP* and of the Fifth Circuit in *NOPSI* are incorrect. Each court affirmed the district court's dismissal of the complaint on abstention grounds. The Sixth Circuit apparently relied only on *Younger* abstention,[9] while the Fifth Circuit relied on both *Burford* and *Younger* abstention. We do not believe that either *Burford* or *Younger* abstention was proper in either case.

a. *Burford* abstention is appropriate when a federal court is presented with "complex issues of state law, resolution of which would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *Zablocki* v. *Redhail*, 434 U.S. 374, 380 n.5 (1978) (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976)); see *McNeese* v. *Board of Education*, 373 U.S. 668, 673 (1963); *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593, 593-594 (1968) (per curiam); *Alabama Public Service Comm'n* v. *Southern Ry.*, 341 U.S. 341, 347 (1951); *Hastings* v. *Selby Oil*, 319 U.S. 348 (1943). Thus, this Court concluded in *Burford* that it would be best to "leave these problems of [state] law to the state court" because of the great harm to state policies that might result from federal court misinterpretation of state law concerning the development, production, and conservation of in-state oil and gas resources (319 U.S. at 332; see *id.* at 327, 329-330, 331 & n.28, 333).

No such state law or state policy concerns are present in either *AEP* or *NOPSI*. The basic issue in both cases is the scope of federal law and federal policy. There has been a congressional determination that terms for the allocation of power and costs among members of a multi-state public utility holding company should be conclusively resolved by a neutral federal administrative forum (FERC) in accordance with federal law. The question whether a particular FERC allocation must be honored

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[9] Although the court's per curiam opinion held that *Younger* abstention was required and *Burford* abstention was not required (86-49 Pet. App. 1a-6a), two judges of the three-judge panel stated in separate concurring opinions that *Burford* abstention was required (*id.* at 7a-12a).

by a state utility commission in a particular context is itself a federal question. Any disruption of state law or policy resulting from a FERC allocation or from a decision that a state is required to honor it would be a deliberate result of the congressional scheme, and therefore *Burford* abstention is inappropriate. Cf. *Zablocki* v. *Redhail*, 434 U.S. at 379-380 n.5 ("there is of course no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy"); *England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411, 415-416 (1964) ("recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law"); *Silverman* v. *Barry*, 727 F.2d 1121, 1123-1124 n.4 (D.C. Cir. 1984).

b. *Younger* abstention is also inappropriate. The most "vital consideration" prompting *Younger* abstention is the "notion of comity, that is * * * the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways" (401 U.S. at 44). See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools*, No. 85-488 (June 27, 1986), slip op. 6; *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982); *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977); *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 601 (1975). The notion of comity loses much of its force, however, where, as in both *AEP* and *NOPSI*, the interests of several states are at odds because of their participation in a multistate "common pool," in which a decision by the institutions of any one state in favor of its citizens has or is at least likely to have a corresponding direct adverse effect on citizens of the other participating states. See *Mississippi Industries* v. *FERC*, 808 F.2d at 1548-1549; *Appalachian Power Co.* v. *Public Service Comm'n*, No. 86-2540 (4th Cir. Mar. 4, 1987), slip op. 15-17; *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*,

772 F.2d 404, 416-417 (8th Cir. 1985); see generally, Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).[10] Unlike the federal claims at issue in *Younger* and its progeny, the claims in such inherently interstate disputes are not readily susceptible to resolution by leaving states "free to perform their separate functions in their separate ways."

We do not mean to suggest that merely because the issue is federal preemption, abstention is always inappropriate; state tribunals are of course generally obliged to evaluate claims that federal law has preemptive effect. But Congress gave FERC exclusive jurisdiction to regulate interstate wholesale rates precisely because such matters involve inherent conflicts between the interests of different states and localities. Under those circumstances, the considerations underlying *Younger* abstention, particularly the notion of comity, do not have substantial force. Plaintiffs in such inherently interstate disputes, such as the petitioners in *AEP* and *NOPSI*, should not be deprived of their choice of a federal judicial forum to hear their federal preemption claim. Cf. *Western Air Lines* v. *Board of Equalization*, No. 85-732 (Feb. 24, 1987), slip op. 6 ("The general principle that * * * the meaning of words in a federal statute is a question of federal law has especial force when the purpose of the federal statute is to eliminate discriminatory state treatment."); *Hagans* v. *Lavine*, 415 U.S. 528, 530 (1974) (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729 (1966) (" 'the federal courts are particularly appropriate bodies for the application of preemption principles' ").[11]

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[10] The common pool may consist of shared benefits, such as the low-cost power available to the utilities under the Interconnection Agreement in *AEP*, or of shared burdens, such as the investment costs associated with the "catastrophically uneconomical" Grand Gulf 1 nuclear power plant in *NOPSI* (*Mississippi Industries* v. *FERC*, 808 F.2d at 1528 (86-546 Pet. Supp. Br. 7)).

[11] *Younger* abstention is also inappropriate in *NOPSI* because the ongoing proceedings before the City Council are not (at least not entirely) " 'judicial in nature' *from the outset.*" *Ohio Civil*

2. Review of the abstention issue is warranted because the issue is important and there is a conflict in the circuits concerning whether abstention is required in these circumstances.

a. To date, five courts of appeals have addressed the issue whether abstention is warranted in the context of a federal preemption claim based on the "filed rate doctrine." The decisions reflect widely differing views. The Sixth and Fifth Circuits agree that *Younger* abstention is appropriate (see 86-49 Pet. App. 6a-7a; 86-546 Pet. App. A21-A24), although apparently only the Fifth Circuit believes that *Burford* abstention is generally appropriate (86-546 Pet. App. A19; see note 9, *supra*). The third and Eighth Circuits have rejected both *Burford* and *Younger* abstention in the context of preemption claims similar to those raised in *AEP* and in *NOPSI*. See *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n*, 791 F.2d 1111 (3d Cir. 1986); *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), cert. denied, No. 85-895 (Jan. 27, 1986). Indeed, the preemption claim in *Middle South Energy, Inc.*, like the preemption claim in *NOPSI*, arose out of FERC's allocation of the costs of the Grand Gulf 1 nuclear power facility; it involved the efforts of a state public service commission to shield the citizens of Arkansas from absorbing AP&L's FERC-allocated share of those costs. The Eighth Circuit in *Middle*

Rights Comm'n v. *Dayton Christian Schools*, slip op. 7 (emphasis added) (quoting *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. at 433-434); see *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 237-239 (1984). The City Council is a popularly elected legislative body. When setting rates, its proceedings are not judicial; they are "essentially a legislative function." *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589 (1945); see also *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968). Moreover, the Council is also, inter alia, evaluating possible condemnation of NOPSI. See note 8, *supra*. It may not be appropriate to presume that in this multistate dispute, the Council can provide the unbiased state decisionmaking forum upon which *Younger* abstention is predicated. Cf. *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973).

South Energy, Inc., unlike the Fifth Circuit in *NOPSI*, however, held that neither *Burford* nor *Younger* abstention was required because the plaintiffs were claiming that federal law preempted the ongoing state proceeding itself (772 F.2d at 417).[12]

Finally, two Fourth Circuit decisions, both also involving the abstention issue raised in the context of a preemption claim based on the filed rate doctrine, further illustrate the scope of the current circuit conflict. In *Aluminum Co. of America* v. *Utilities Comm'n*, 713 F.2d 1024, 1030 (1983), cert. denied, 465 U.S. 1052 (1984), the Fourth Circuit upheld abstention on *Burford* grounds after concluding that evaluation of plaintiff's claim—that the state commission's establishment of retail, intrastate rates conflicted with FERC-approved wholesale interstate rates—would require detailed factual inquiry. The court of appeals suggested, however, that abstention would not be appropriate in a case where the conflict between state and federal law was direct and clear (*ibid.*). Presumably based upon that caveat, the Fourth Circuit more recently affirmed a district court's denial of both *Younger* and *Burford* abstention in the context of a preemption claim more akin to that present in *NOPSI* and *AEP*. See *Appalachian Power Co.* v. *Public Service Comm'n*, 614 F.Supp. 64 (S.D. W.Va.), aff'd, 770 F.2d 159 (4th Cir. 1985), on remand, 630 F.Supp. 656 (S.D. W.Va. 1986), aff'd, No. 86-2540 (Mar. 4, 1987). In *Appalachian Power*, the utility had challenged

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[12] In *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n, supra*, the Third Circuit considered a public utility's claim that the federal Natural Gas Act, 15 U.S.C. 717 *et seq.* and the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, preempted the state public service commission's authority to refuse the utility's request to pass through increased costs reflected in interstate tariffs filed with and approved by FERC. The court declined *Burford* abstention on the ground that the preemption claim did not present an essentially local issue (791 F.2d at 1116), and rejected *Younger* abstention largely because the ongoing state proceeding implicated important federal interests as well as state interests (*id.* at 1116-1117).

the state public service commission's refusal to authorize the recovery of costs reflected in the same Transmission Agreement at issue in *AEP* until the utility submitted the Agreement to the commission for its study and ultimately its approval.[13]

b. We also share petitioners' view that the abstention issue is important. The plethora of lower court decisions involving the same abstention issue—and sometimes even involving overlapping factual circumstances as in *NOPSI* and *Middle South Energy, Inc.*, and as in *AEP* and *Appalachian Power Co.*—is no mere happenstance. During the last several decades utilities in neighboring states have increasingly affiliated and entered into joint financing and power sharing arrangements to construct the more massive power production facilities necessary to meet predicted increases in energy demand. Construction cost overruns, sometimes of catastrophic dimensions, and lower than predicted energy demand, however, have severely strained those arrangements and produced the interstate disputes reflected in these cases. The establishment of a fair and expeditious mechanism for the resolution of these disputes, including a more settled understanding of when federal court intervention should

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[13] Although respondents in *AEP* do not deny the existence of a conflict in the circuits, respondents in *NOPSI* argue (86-546 Br. in Opp. 22-24) that the differing court of appeals decisions simply reflect the different circumstances of each case and the appropriateness of case-by-case review. We share respondents' view that there is, of course, no per se rule against abstention in a federal preemption case. See, *e.g.*, *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 511-512 (1972). We also agree that the propriety of abstention depends on the nature of the particular preemption claim at issue. In our view, however, the various court of appeals decisions amply reveal a clear circuit conflict on the important issue whether abstention is appropriate in the context of a preemption claim based on the filed rate doctrine. In addition, petitioners cannot avoid the conflict by claiming that those cases "in which the court refused to abstain * * * involved a direct, facial conflict" (86-546 Br. in Opp. 23 n.29) because both *AEP* and *NOPSI* include such facial challenges (see pages 24, 25-27 & note 14, *infra*), yet the Sixth and Fifth Circuits directed abstention.

be permitted, is plainly important and would be furthered by this Court's review.

Resolution of the abstention issue is, moreover, especially important to a fair resolution of these interstate disputes. As *NOPSI* illustrates, a utility's liability for wholesale costs may be immediate and ongoing, and a delay in passing those costs through in retail rates will often have consequences that are irreparable; apart from immediate cash flow problems and uncertainties that may threaten bankruptcy, impede securities offerings, and force compromise settlements (see page 15, *supra*), it is neither feasible nor lawful in most jurisdictions (including Louisiana, see note 17, *infra*) to charge "catch-up" retail rates once a retail increase is finally permitted. Delay in the decisionmaking process therefore often permanently traps costs borne by the utility. Hence, federal policy may be frustrated by lengthy state proceedings. Because abstention may contribute to this result by adding to the delay, the issue whether the policy concerns underlying either *Burford* or *Younger* require abstention in these circumstances is particularly significant.

3. Whether this Court should grant review in *AEP*, in *NOPSI*, in both, or in neither, is a more difficult question. Both *AEP* and *NOPSI* present the abstention issue that we believe warrants this Court's review, but in both cases (particularly *AEP*) the issue is blemished by procedural problems. On balance, we are persuaded that the Court should grant review in *NOPSI*, which better presents the issue. The petition in *AEP* should not be denied, but should be held pending disposition of *NOPSI*. Similar problems are likely to encumber future candidates for this Court's review in this area and the abstention issue is sufficiently concrete in *NOPSI*, and too important, to let slip this opportunity for review.

a. *AEP* is not an attractive candidate for review for two principal reasons. First, the preemption issue was not sharply delineated either when the petitioners brought the case in the first instance or when the lower courts ruled on abstention. FERC only more recently clarified

its views concerning the proper role of the Kentucky Commission in reviewing the Interconnection Agreement and the Unit Power Sales Agreement and FERC only recently interpreted for itself the relevant provisions of the two Agreements. See *AEPGCo*, 38 F.E.R.C. ¶ 61,243 (1987); *Kentucky Power Co.*, 37 F.E.R.C. ¶ 63,015 (1986); *Kentucky Power Co.*, 36 F.E.R.C. ¶ 61,227 (1986) (KPSC Br. in Opp. App. 7a-20a); *AEPGCo*, 36 F.E.R.C. ¶ 61,226 (1986) (KPSC Br. in Opp. App. 21a-27a); pages 7-9, *supra*. The conflict between the Kentucky Commission's order and FERC's authority therefore was not clear when the lower courts decided to abstain, which, at the very least, diminishes the conflict the case presents with those court of appeals decisions that reject abstention in the face of a direct, facial conflict between state regulatory action and federal law.[14]

In addition, the Court's opportunity to reach the abstention issue in *AEP* is threatened because Kentucky Power also initiated a parallel state judicial proceeding that has since resulted in a judgment (see KPSC Br. in Opp. App. 1a-6a). As a result, the abstention issue is now further obscured in *AEP* by respondents' claim that res judicata now precludes federal court reconsideration of the preemption claims. Whatever the merits of respondents' reliance on res judicata, it is a "difficult" issue to avoid (see *Huffman* v. *Pursue, Ltd.*, 420 U.S. at 607-608 & n.19),[15] and we are reluctant to recommend

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[14] Petitioners in *AEP* may suggest that, apart from their preemption claim in connection with the Unit Power Sales Agreement, the Transmission Agreement filed with FERC also gave them rights (unobscured by the problems discussed in the text) that were violated by the Kentucky Commission's order. However, even if shifting the focus to the Transmission Agreement, which was barely discussed by the court of appeals (see 86-49 Pet. App. 2a n.1), provides a firmer preemption argument, it does not avoid our other principal concern with *AEP*—the effect of the parallel state proceeding—and, hence, does not affect our judgment that this Court should simply hold *AEP* pending review of *NOPSI*.

[15] Whether petitioners may rely on Kentucky Power's apparent effort to reserve the federal issues from state court consideration

that this Court grant review when we cannot be confident that the Court will have the opportunity to address the important issue whether abstention is required.[16]

b. Although *NOPSI* is not wholly free from procedural problems, we believe the Court should grant review in *NOPSI* because the abstention issue is sufficiently concrete and the circumstances of the case illustrate particularly well the competing policy concerns present in these abstention cases.

No parallel state court proceeding obscures the abstention issue in *NOPSI* and the underlying federal preemption claim is clear. In *NOPSI*, unlike *AEP*, the utility's request for rate relief derived from a final FERC decision: FERC had issued its final allocation determination with respect to a fair allocation of the costs of Grand Gulf 1. See *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305, on reh'g, 32 F.E.R.C. ¶ 61,425 (1985), aff'd, *Mississippi Industries Inc.* v. *FERC*, 808 F.2d 1525 (D.C. Cir. 1987). NOPSI's claim under federal law therefore was clear from the outset: the New Orleans City Council was obliged to respect FERC's determination of NOPSI's share of the costs of Grand Gulf 1, and to authorize retail rates that would prevent "trapping of [those] costs" (*Nantahala Power & Light Co.* v. *Thornburg*, slip op. 17). See *Narragansett Electric Co.* v. *Burke*, 119

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pursuant to this Court's decision in *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) is not clear. This Court established the *England* procedure in the context of *Pullman* abstention, in which, unlike either *Burford* or *Younger* abstention, the federal lawsuit is stayed and is not dismissed. See *id.* at 415 n.5; 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4245, at 490-491 (2d ed. 1978).

[16] The initiation of the parallel state judicial proceeding by Kentucky Power, while understandable, also injects comity considerations into *AEP* not present in *NOPSI* (see *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976)).

R.I. 559, 381 A.2d 1358 (1977), cert. denied, 435 U.S. 972 (1978).

The record in *NOPSI* suggests that the City Council nonetheless resisted its obligation to treat FERC-allocated expenses as reasonable operating costs and instead launched an inquiry into the "legality and prudency" of the Grand Gulf 1 contracts that it had no authority to conduct. Instead of allowing NOPSI an immediate pass-through of its costs, it provided NOPSI with "interim relief" which, at best, kept NOPSI solvent from a cash standpoint and, at worst, threatened NOPSI with bankruptcy. The Council invited NOPSI to remain solvent by issuing securities but also undermined that option by preventing NOPSI from immediately recovering substantial costs (see pages 12-13 & note 6, *supra*). The City Council's decision effectively denied NOPSI full recovery of its share of the Grand Gulf 1 costs—approximately $15.5 million per month—for at least 10 months, pending the Council's investigation, contrary to *Nantahala*'s prohibition on the "trapping" of FERC approved costs.[17]

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[17] While the Council formally stated that "[i]f the amount of permanent rate relief ultimately allowed is greater than amount collected through the interim rates, [NOPSI] shall be allowed to recover those additional amounts, with interest, in the future" (Resol. R-85-526, at 12 (Sept. 5, 1985)), that promise would appear to be an empty one because the City Council appears not to have auhority to make that guarantee. The Louisiana Supreme Court in 1979 rejected a utility's effort to recover for past expenses on the ground that such retroactive cost recovery was unlawful in Louisiana because it had not been expressly authorized by statute or by the state constitution. See *Louisiana Power & Light Co.* v. *Louisiana Public Service Comm'n*, 377 So. 2d 1023, 1027-1029 (La. 1979). The Council also denied NOPSI's request for assurances that the costs would be recovered in future rates; NOPSI apparently needed those assurances to avoid treating the cost deferrals as "losses" under generally accepted accounting principles. See Resol. R-85-635 (Oct. 10, 1985). One stated ground for the Council's negative determination was the possibility that the Council might later conclude that recovery was inappropriate because the costs had been imprudently incurred (*id.* at 3).

The district court abstained in the face of NOPSI's preemption challenge to the City Council's actions, including its denial of full recovery at least during a 10 month investigation. In our view, on the facts alleged, the Council's action clearly conflicted with the filed rate doctrine and, hence, for the reasons previously discussed (see pages 17-19, *supra*), *Burford* or *Younger* abstention was improper. As reflected in the Council's original explanation for denying pass-through in July 1985 (see Resol. R-85-423 (July 17, 1985)) and again in August 1985 (see Resol. R-85-466 (Aug. 8, 1985), and in its subsequent formal announcement of a lengthy prudence investigation in October 1985 (see Resol. R-85-636 (Oct. 17, 1985)), the Council's stated purpose was to investigate whether NOPSI acted prudently in incurring its allocated share of the Grand Gulf 1 expenses. But that was a matter within FERC's exclusive jurisdiction,[18] and, indeed, the City Council had participated in the determination both before FERC and in the District of Columbia Circuit on review of the FERC decision. For this reason, the City Council could not legitimately deny NOPSI's request for recovery of its FERC allocated costs while the Council undertook a 10 month prudence investigation. Cf. *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. 456, 468 (1943)).

Respondents now claim (86-546 Br. in Opp. 10-13) for the first time in this Court that a partial settlement entered into by the parties in March 1986, almost six

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[18] FERC specifically found that all decisions regarding the planning and construction of Grand Gulf 1 were made by the Middle South System as a whole and that the individual operating companies, such as NOPSI, had no "autonomy" in the planning and construction process (31 F.E.R.C. at 61,649-61,651). FERC's finding precludes any investigation by the City Council into the prudency of NOPSI's participation. The Council's sole remedy was to seek review of FERC's decision before the United States Court of Appeals for the District of Columbia Circuit, which recently upheld FERC's decision in a case to which the City of New Orleans was a party. See *Mississippi Industries* v. *FERC*, 808 F.2d 1525, (D.C. Cir. 1987).

months before the decision of the court of appeals, renders the case moot. We disagree. NOPSI's complaint challenged the City Council's authority to deny pass-through of NOPSI's Grand Gulf 1 costs, which necessarily included a challenge to the Council's authority to deny recovery on prudence grounds, and under the partial settlement the Council expressly reserved the right to decrease NOPSI's recovery based on the results of the Council's prudence investigation. That prudence investigation is still underway and therefore the issue of its lawfulness under federal law, including whether the Council may further decrease NOPSI's recovery on prudence grounds,[19] is very much a live controversy. Hence, the abstention issue presented in *NOPSI* is not moot.[20]

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[19] Under the partial settlement NOPSI has already agreed to absorb $51.2 million of the costs of Grand Gulf 1 (see Resol. R-86-112 (Mar. 20, 1986)). Thus, to a certain extent, the City Council has already achieved the "trapping of costs" prohibited by this Court's decision in *Nantahala.*

[20] That the prudence investigation was formally initiated after the complaint was filed and is the subject of a second complaint filed by NOPSI, recently dismissed by the district court on ripeness and on both *Younger* and *Burford* abstention grounds (see *Middle South Energy* v. *The Council of New Orleans*, No. 85-5273 (E.D. La. Dec. 18, 1986) (Pet. Supp. Br. App. B1-B9); see note 7, *supra*), does not support a different result. The Council's denial of an immediate rate increase, and announcement of its intention to examine the prudence of the Grand Gulf 1 costs, preceded the first injunction complaint, which is the subject of the present petition. Moreover, it is plainly permissible for the Court to consider events occurring subsequent to the filing of the original complaint and the district court's decision in determining whether the original complaint still presents a live controversy and in determining the current contours of that controversy. See *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. at 437; *id.* at 438-439 (Marshall, J., dissenting); see also *Huffman* v. *Pursue, Ltd.*, 420 U.S. at 612; *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. at 466. We see no reason to suppose that a different rule should obtain merely because the subsequent event also happens to be relevant to a later-filed and somewhat overlapping complaint.

Respondents further claim (86-546 Br. in Opp. 13 n.13) that the Court should simply deny the writ of certiorari on mootness grounds. Although, as discussed in the text, we do not believe

CONCLUSION

The petition for a writ of certiorari in *NOPSI*, No. 86-546, should be granted and the petition in *AEP*, No. 86-49, should be held pending this Court's decision in *NOPSI*.

Respectfully submitted.

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that *NOPSI* is moot, a denial of certiorari would not be appropriate even if the case were moot. Instead, if the Court concludes that *NOPSI* is moot, the Court should grant certiorari and remand the case to the Fifth Circuit with instructions to vacate the judgment on mootness grounds. See *Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Respondents' reliance (86-546 Br. in Opp. 13 n.13), on *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) for support of their contrary view is misplaced because in this case, unlike *Velsicol*, review would be justified in the absence of mootness and therefore a denial of certiorari would not be appropriate.

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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

and

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court, the Edison Electric Institute ("EEI") respectfully moves for leave to file the attached brief as *amicus curiae*.[1]

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[1] EEI has obtained consent to file this brief from the Petitioners and a Respondent, the Concerned Citizens of Martin County. The letters granting consent have been filed with the Clerk of the Court. The other Respondents have not consented to EEI's participation.

SPECIAL INTEREST OF THE EDISON ELECTRIC INSTITUTE

EEI's members are investor-owned electric utilities that generate, transmit and sell electricity at wholesale and at retail throughout the nation. These services are made available to customers via power supply and distribution arrangements that cross state lines, creating a nationwide power system that requires uniform and predictable regulation.

At issue in this case are matters of urgent concern to virtually every member system of EEI, almost all of whom participate in one or more forms of interstate transactions, incurring costs pursuant to federally-approved rates which are then scrutinized by state utility commissions with results often at variance with federal regulation. All utilities have a stake in the availability of the federal district courts for the arbitration of such federal questions as preemption and undue burden on interstate commerce. Every electric utility company faces the potential conflict between federal and state regulation of contracts and rates that is an inevitable result of our system of dual regulation and interstate power arrangements.

This clash between two regulators will arise in many factual situations, some similar to and others differing from the one that the Petitioners are now presenting to the Court. As utilities become more deeply involved in interstate arrangements, the same question of the scope of the Federal Energy Regulatory Commission's plenary jurisdiction over such transactions will arise—as will the question of whether and if so, when, a federal district court should abstain from deciding that question on the merits. EEI's members have a vital interest in this Court's evaluation of the interplay between federal and state interests in public utility regulation that goes beyond the specific factual issue presented by the Petitioners.

EEI believes that it can provide insight as to the national scope of the concerns at issue in this case. The attached brief as *amicus curiae* demonstrates the significance of these issues to all of EEI's members.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the attached brief, EEI respectfully requests that the Court grant its motion for leave to file the attached brief as *amicus curiae.*

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") is the nation's association of investor-owned electric utilities. The members of EEI supply electric service to consumers throughout the United States, serving approximately 96 percent of all customers of investor-owned utilities and 73 percent of this country's electricity users.

Electricity plays a role well beyond a convenience—it is a necessity for everyday life. Increasingly, the ability to provide this critical resource on a reliable and economic basis rests upon an array of wholesale transactions among EEI's members, transactions that include regional power

pooling and coordination, purchases, sales, exchanges, interconnections, and transmission arrangements. These wholesale flows of power extend across every state border in the continental United States, and provide enormous benefits to power consumers.

There can be no question that the maintenance of a reliable network of power generation, transmission, and distribution is a task that is national in scope and consequence. Because each state strives to achieve the lowest electric rates for its residents and native industries, the allocation of costs for multistate energy resources such as large generating plants and transmission grids raises issues in which a state's interests will compete with those of its neighbors. The cost allocations and other adjustments that must be made can be accomplished only by a neutral federal arbitrator. The rates and other conditions governing interstate wholesale power and transmission transactions are therefore administered exclusively by the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act ("FPA" or "the Act"). At the close of the last term, this Court emphasized the need for federal oversight of these interstate power operations. *Nantahala Power & Light Co. v. Thornburg*, 54 U.S.L.W. 4676 (U.S. June 17, 1986) ("*Nantahala*").

One means by which states have sought to advance the interests of their ratepayers is by disallowing a utility's costs incurred under the rates and other terms of wholesale transactions regulated by FERC. These "trapped costs", as the Court described them in *Nantahala*, must then be borne either by another state's ratepayers [1] or by the public utility's shareholders. The response of other states is predictable—a similar rejection of the cost burden.

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[1] Ironically, it is the interstate character of the transactions involved that provides a ready vehicle for a state to attempt to shift a cost burden to another state.

As dramatically illustrated by the controversies of this nature to date, when a utility's costs are "trapped" by conflicting retail and wholesale rate orders, it suffers immediate financial repercussions. Its cash flow is disrupted, and its ability to make needed purchases of fuel or power and to finance additional capital expenditures is diminished. Such orders can quickly precipitate grave financial crises, and interrupt the operation of wholesale power transactions affecting utilities in several states. EEI members that have invested in generating plant or transmission facilities owned by several utilities serving retail customers in different states may also find the financial vitality of their co-owners, and hence of a project, affected by the retail rate actions of other state commissions.

The adverse effects of such financial distress are felt not only by shareholders, but by the utility's customers as well, because the company's ability to attract capital and operate on a least-cost basis is impaired. Unless promptly remedied, these events cannot help but discourage reliance upon interstate interconnections and pooling arrangements—transactions that increase the interstate availability of economic and reliable electrical energy at competitive prices.

EEI's members have a vital interest in securing a prompt and fair arbitration of conflicts that arise when state actions upset the complex network of interstate power operations. Delay in obtaining redress can devastate a utility wedged between inconsistent state and federal regulation. In *Nantahala*, the Court unanimously ruled that a North Carolina utility commission was preempted from disallowing in retail rates millions of dollars incurred under wholesale power arrangements established by FERC.[2] This Court's decision came, however, only after several years of delay and great financial hardship

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[2] EEI also participated in the *Nantahala* proceedings in this Court through the filing of an *amicus* brief.

for the utility in that case, prompted by a federal district court's decision [3] to abstain from hearing an earlier challenge to the state commission's rate order.

Now, the Sixth Circuit has also held in the *American Electric Power* (*"AEP"*) case below that federal district courts should abstain from reviewing cases where state orders are challenged as violating the federal scheme of oversight. The case before the Court here thus presents the companion to *Nantahala*. *Nantahala* established the principle—this case raises the question of how that principle is to be honored.

STATEMENT OF THE CASE

EEI adopts the Petitioners' Statement of the Case.

REASONS WHY THE COURT SHOULD GRANT THE WRIT

I. THE DECISION BELOW PRESENTS A PROBLEM IN FEDERAL COURT ADMINISTRATION THAT WILL BE EXACERBATED IF LEFT UNRESOLVED.

No issue is as quintessentially suited to instruction from this Court as the question of how the federal judiciary should deploy its jurisdiction.[4] If district courts abstain under the circumstances presented to the Sixth Circuit, the burgeoning array of cases raising the same

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[3] *Aluminum Co. of America v. Utilities Comm'n of N.C.*, No. 82-376 (E.D.N.C. July 30, 1982), *aff'd*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984) (*"Alcoa"*).

[4] The opinion of the Sixth Circuit is unpublished, despite motions by the Petitioners and FERC to have it published. This should not, however, deter the Court from granting certiorari. Rule 24 of the local rules of the Sixth Circuit permits the citation of unpublished decisions in that Circuit. Hence, the case can have precedential value. *See* 6th Cir. R. 24(b). Moreover, this Court has on a number of occasions granted certiorari for unpublished decisions. *See, e.g., DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983); *Branti v. Finkel*, 445 U.S. 507, 509 (1980); and *Brown v. Felsen*, 442 U.S. 127, 130 (1979).

issues will merely be deflected to this Court time after time for decision.

In contrast to the Sixth Circuit, the Third, Fifth and Eighth Circuits have all very recently addressed cases factually similar to the *AEP* case, but have found abstention to be inappropriate.[5] The Sixth Circuit's invocation of abstention has been joined only by the Fourth Circuit in *Alcoa* (*supra* n.3), although the Sixth Circuit expressly declined to follow the Fourth Circuit's reasoning in *Alcoa*. It should be noted that subsequent to *Alcoa*, in *Appalachian Power Co. v. Public Service Commission of West Virginia*, 614 F. Supp. 64 (S.D.W.Va.), *aff'd*, 770 F.2d 159 (4th Cir. 1985) (*"Appalachian Power"*), the Fourth Circuit, in an unpublished decision, affirmed a district court injunction of a state rate commission order on grounds of preemption, without expressly addressing the question of whether the district court should have invoked abstention theory. Notably, *Appalachian Power* involved the same transmission equalization agreement as that involved in the Sixth Circuit. In short, five circuits have addressed virtually the same problem; one squarely favors abstention, one has favored abstention when the issue was before it, and three do not.[6]

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[5] *Kentucky W.Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111 (3d Cir. 1986) (decided under the Natural Gas Act); *New Orleans Pub. Serv., Inc. v. New Orleans*, 782 F.2d 1236 (5th Cir. 1986) (*"NOPSI"*); and *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 884 (1986) (*"Middle South"*). On June 10, 1986, however, the Fifth Circuit requested the parties to submit further briefing on the question of whether the district court in *NOPSI* should have abstained. The FERC has stated its concern about the threat posed to the integrity of the federal scheme of regulation that abstention creates, both in a brief on appeal of the district court's abstention in *NOPSI*, and in response to the Fifth Circuit's June 10 request for further briefing on the matter.

[6] In addition, the U.S. District Court for the Western District of Missouri, in *Arkansas Power & Light Co. v. Missouri Public Service Commission*, No. 86-4067 (W.D.Mo. March 10, 1986), ruled against abstention, citing the *NOPSI* case.

In considering whether to grant certiorari, this Court has traditionally accorded weight to the existence of a split among the circuits in cases involving the same question of law.[7] The split, here, however, points up an even more urgent reason for review. The many occasions on which federal district courts are facing these cases reveal a burgeoning trend in state utility commissions. At the very time that utilities are moving toward a greater reliance upon multistate transactions, states like Kentucky in the case below and like North Carolina in the *Nantahala* case are encroaching on the federal administration of interstate wholesale power and transmission arrangements.

In *Nantahala*, this Court resolved the substantive law on the question—and in so doing, indicated that the question is one reserved to the federal domain. Yet without effective arbitration of these matters before the federal district courts, utilities will have no route other than that forced upon the utility in *Nantahala* when the district court abstained; that is, to face years of crushing delay while the matter is pursued through the state court system, and, at the end of that struggle, to seek redress through a direct appeal to this Court.

Now that the Supreme Court has spoken, these questions are far better suited to district court adjudication. The controversies will inevitably call upon the decisionmaker to probe how costs may be "trapped", and whether the state has crossed over the line that separates proper local ratemaking from federal oversight of the interstate power grid. The facts will vary from case to case, some involving regional pooling agreements and multistate cost allocations; others, unit power sales among multistate affiliates; still others, the proper level of costs to be included in the rate charged by one utility to another in a bilateral wholesale arrangement. The practical result of abstention

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[7] *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, §§ 4.3-4.4 (6th ed. 1986), and discussion therein.

is to force resort to the Supreme Court for repeated resolution of these detailed matters that are far more readily and efficiently resolved by federal district courts.[8] To allow the Sixth Circuit's decision to stand will encourage further isolation of the federal district courts from key national power issues and unnecessarily burden this Court's docket.

II. THE FEDERAL INTEREST AT STAKE IN THE CASE BELOW PRESENTS A SETTING WHERE ABSTENTION IS NOT ONLY INAPPROPRIATE TO THE ISSUES, BUT EFFECTIVELY PREJUDGES THE FEDERAL CLAIM.

Firm guidance from this Court is needed, as highlighted not only by the split of authority among the circuits, but also among the three judges who rendered the decision below. *See* Pet. at 7-8. The opinion of the court was accompanied by two separate concurrences. The Sixth Circuit's *per curiam* decision stated that *Younger* abstention applied, but not *Burford* abstention. *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Two members of the three-judge panel disagreed, however, maintaining that *Burford* abstention did apply. Pet. App. at 7a, 10a. One Judge stated that *Younger* did not apply. Pet. App. at 10a. Thus, of the three, no single judge was able to agree with the others as to the appropriate analysis of abstention principles.

The Sixth Circuit's broad application of the abstention doctrine is at complete odds with this Court's guidance that federal district courts possess a "virtually unflagging obligation . . . to exercise the jurisdiction given them" and that abstention is to occur only in exceptional cir-

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[8] This Court has noted that appellate review is an "inadequate substitute" for an adjudication by a federal district court. *See England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964) (*Pullman* abstention).

cumstances. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976) (*"Colorado River"*). By its ruling, however, the Sixth Circuit allows the exception to swallow the rule.

At their core, both *Younger* and *Burford* abstention are premised on comity in the face of state interests and proceedings. Where the question before the court is preemption or a Commerce Clause challenge, however, the decision to abstain is in effect a decision on the merits of the substantive question, because the court has already determined that state interests outweigh federal concerns. *See, e.g., Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982) (*citing International Bhd. of Electrical Workers v. Pub. Serv. Comm'n of Nev.*, 614 F.2d 206, 212 n.1 (9th Cir. 1980)) (preemption).

Thus, when the divided Sixth Circuit panel ruled that abstention—either *Younger* or *Burford*—was appropriate, it necessarily ruled that the purported state interests outweighed any federal considerations.[9] That decision effectively decided the federal question in a fashion directly contrary to *Nantahala*, but concealed review of the issue under the guise of a doctrine rooted in equitable discretion.

A. Where State Action Directly Thwarts A Federal Scheme Of Regulation, The Interest At Stake Is Federal, And *Younger* Abstention Is Inapposite.

The Sixth Circuit's decision to apply *Younger* abstention policy is a unique application of the doctrine to a

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[9] In *Baggett v. Department of Professional Regulation, Board of Pilot Commissioners*, 717 F.2d 521, 524 (11th Cir. 1983) (*"Baggett"*), the Eleventh Circuit noted that when Congress asserts its exclusive jurisdiction, it has "decreed" that no deference is due state proceedings that interfere with the federal domain. The court implicitly acknowledged that abstention would fail to give federal interests their due weight.

preemption challenge of a state utility commission decision. Not even the Fourth Circuit in *Alcoa* went so far.[10] In fact, this case presents the opposite of *Younger*. Here, the state order directly interferes with the federal execution of FERC's statutory obligations.

The most recent discussion by this Court of *Younger* was in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 54 U.S.L.W. 4860 (U.S. June 24, 1986) (*"Ohio Commission"*). There, the Court noted that *Younger* counsels against federal court interference when *particular kinds* of state proceedings have commenced. *Ohio Commission*, 54 U.S.L.W. at 4862. Although the *Younger* doctrine sprang from recognition of comity and federalism in the face of state criminal proceedings, the Court noted that it had extended *Younger* to those civil proceedings in which "important state interests are involved . . . [and] to state administrative proceedings in which important state interests are vindicated, so long as . . . the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim."[11] *Id. See also Middlesex*, 457 U.S. at 432.

Each of the cases invoked by the Court represented enforcement or disciplinary proceedings that implicated the state's most basic police powers in protecting by the means of sanctions the morals, health or safety of its citizens. *Huffman* involved a proceeding to close an obscene theater as a public nuisance; at issue in *Trainor* was civil attachment as the remedy for fraudulent concealment of assets in obtaining state public assistance.

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[10] In a footnote, the Fourth Circuit adverted favorably to *Younger*, but declined to apply it directly. *Alcoa*, 713 F.2d at 1029 n.2.

[11] *Citing Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (*"Middlesex"*); *Moore v. Sims*, 442 U.S. 415 (1979) (*"Moore"*); *Juidice v. Vail*, 430 U.S. 327 (1977) (*"Juidice"*); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (*"Trainor"*); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (*"Huffman"*); and *Gibson v. Berryhill*, 411 U.S. 564 (1973) (*"Gibson"*).

Juidice challenged the state's right to imprison individuals for contempt of court, and *Moore* addressed state procedures regarding the removal from the home of allegedly abused children. *Gibson* and *Middlesex* challenged disciplinary proceedings to revoke state-granted professional licenses.

In invoking *Younger*, the Sixth Circuit broadly asserted that "[t]here is little question here that the regulation of consumer electric rates is an important state interest." Pet. App. at 6a. States presumably have a strong interest in every activity they undertake. Not all state interests, however, come within the reach of *Younger*. The state in its role as the regulator of a utility's retail rates is not functioning in the same role as when it enforces its criminal laws, imposes sanctions for wrongful conduct, or disciplines the professionals it licenses. The state *qua* state is not injured, nor are its legitimate interests in the exercise of its police power ignored, by requiring it to give proper effect to FERC-approved rate orders, as *Nantahala* mandates.[12]

In *Middlesex*, the Court also stated that there must be an adequate opportunity in the state tribunal to raise the

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[12] Justice Stewart anticipated this distinction in his concurrence in *Younger*, where he noted:

> Courts of equity have traditionally shown greater reluctance to intervene in criminal prosecutions than in civil cases. . . . The offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party in a proceeding under a civil statute.

Younger, 401 U.S. at 55 n.2 (Stewart, J., concurring) (citations omitted). *Accord, Huffman*, 420 U.S. at 604-05. *See also Appalachian Power*, 614 F. Supp. at 70: *Younger* abstention is not appropriate with regard to a preemption claim, because it does not involve a state interest that relates to the health, safety and morals of the state's citizens.

constitutional challenge. *Middlesex*, 457 U.S. at 432. While there may in some instances be a state forum for appeal of a rate order, such avenues are wholly inadequate, given the immediate and devastating repercussions of the state action in question. See p. 3, *supra*. Relief denied for years, while the state judicial system grinds slowly to a conclusion, does not afford "the federal plaintiff . . . a full and fair opportunity to litigate his constitutional claim." *Ohio Commission*, 54 U.S.L.W. at 4862.

Moreover, because ratemaking is a function essentially prospective in nature, sums lost in the interim are often unrecoverable. In any event, the possibility of collection of these "trapped" funds at some future time is an inadequate substitute for justice when millions of dollars are at stake. The long delays also serve to shift the ultimate rate burden of the wholesale costs disproportionately to future ratepayers. *Cf. FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 155 (1962).

In short, awaiting protracted litigation through state courts with the hope of an eventual appeal and reversal in this Court cannot stem the severe injury that intervenes. In such circumstances, *Younger* abstention is inappropriate.

B. The Issues Here Are Completely Unrelated To Those Found In A *Burford* Context: Federal Adjudication Will Not Disrupt A Complex State Regulatory Scheme Involving State Law Applied To Local Facts.

If the *Younger* doctrine protects the state's interest in exercising its police-related powers without undue federal interference, then *Burford* abstention is designed to protect a state's expert administration of local law as applied to local issues, so that the state may develop unimpeded a coherent state-wide regulatory policy. *Burford*, 319 U.S. at 332-34; *see also Colorado River*, 424 U.S. at 814-

15. In *Burford*, the Court carefully noted the overwhelming state interest at issue, 319 U.S. at 320, and the expertise of the state court system at interpreting specialized state law. *Id.* at 325-26. There, federal review of state law was creating disruption and confusion in a highly technical state program. *Id.* at 327. When instead the issue presented is a state rate order that directly affects interstate wholesale power and transmission arrangements, the question presented is whether the state has jurisdiction to act at all. *Cf. Baggett*, 717 F.2d at 524. In the presence of such claims, a federal district court is the only forum that can properly and efficiently resolve the dispute.

As with *Younger*, these circumstances present the very opposite of those where abstention would be in order. Here, the state tribunal has endeavored to interpret a federal wholesale rate schedule (the AEP system power pool agreement),[13] an interpretation that is exclusively within FERC's authority.[14] Here, it is the federal judiciary that is expert at construing both the federal law and wholesale rate schedules and ensuring a uniform result. Here, the overwhelming interest is that of the federal government, in its attempt to create and enforce a coherent economic policy for interstate power regulation. Here, delay at the state level disrupts the economic justification for power flows across state borders. *See* pp. 1-2, *supra*. In such circumstances, *Burford* abstention is not appropriate. *See, e.g., Middle South*, 772 F.2d at 417.

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[13] *See* Pet. at 4-5.

[14] The Federal Energy Regulatory Commission has expressly stated in *AEP Generating Co.*, Docket No. ER84-579-005, slip op. at 4-5 (August 20, 1986), that it alone must determine the appropriate interpretation of the parties' rights and obligations under the AEP system agreement, as part of its task in determining just and reasonable cost allocations and rates among the AEP members.

III. WHERE THE SIXTH CIRCUIT FOUND THAT REVIEW IS NOT RESTRICTED BY THE JOHNSON ACT, IT WAS INAPPROPRIATE TO ABSTAIN ON MORE GENERAL EQUITABLE GROUNDS.

In the case below, the Sixth Circuit correctly held that the Johnson Act did not bar district court review, because the action was based on preemption grounds.[15] *See* Pet. App. at 19a, and cases cited therein. Having so determined, it was inappropriate for the court to establish a secondary bar to review.

The Johnson Act, 28 U.S.C. § 1342(1) (1982), statutorily embodies the rule of abstention that might otherwise apply, and defines the boundaries of any state interest in regulating local utility rates that is to be shielded from federal court interference. The statute is couched in terms of enumerated conditions that bar the federal district courts from directly interfering in challenges to state rate orders where those conditions are met. *See Tennyson v. Gas Serv. Co.*, 506 F.2d 1135 (10th Cir. 1974). The challenge must have a jurisdictional basis "solely" in diversity of citizenship or "repugnance of the order to the Federal Constitution", may not raise a Commerce Clause claim, and there must be a fair hearing below. As pointed out by the Petitioners, the Sixth Circuit's application of abstention principles is so broad that it would effectively bar any district court from granting equitable relief in a challenge to state orders affecting rates, not matter how great the clash with a federal statute or burden on interstate commerce. Pet. at 14 n.12. The Johnson Act, however, clearly intends that the federal district courts retain their pivotal function in arbitrating such disputes.

Implicit in the Act's construction, legislative history, and application is the notion that its failure as a bar to

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[15] The same result is obtained where a Commerce Clause ground is raised. *See, e.g., Alcoa*, 713 F.2d at 1028; *Appalachian Power*, 614 F. Supp. at 70.

federal adjudication compels a decision not to abstain under any other doctrine. Enacted in 1934 (and earlier codified at 28 U.S.C. § 41(1)), the Johnson Act was designed to limit the broad grant of federal court jurisdiction over constitutional claims which Congress had conferred in 1875. Act of March 3, 1875, 18 Stat. 470. In the wake of the 1875 Act, Congress passed the three-judge panel provision in the Mann-Elkins Act, the Johnson Act governing rate orders, and finally, the Tax Injunction Act, to "hedge and limit" that broad scope of jurisdiction about which "[e]xperience [had given] rise to dissatisfaction." *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 357-58 (1951) (Frankfurter, J., concurring).

The Johnson Act was aimed at curbing utilities' efforts to obtain a second, *de novo* rate hearing in federal district court solely by alleging that the state order effected an unconstitutional confiscation under the Fourteenth Amendment. *See, e.g.*, 80 Cong. Rec. 1916, 1918-19 (Feb. 5, 1934); H.R. Rep. No. 1194, 73d Cong., 2d Sess. 2-3 (1934). Congress believed that the invocation of such broad "constitutional" grounds allowed the federal district courts to inject themselves directly into the state ratemaking function on questions such as property valuation, that were strictly local in character. 80 Cong. Rec. at 1916.[16]

The Act emerged as a legislative effort to restore the balance between state and federal jurisdiction in the midst of an ongoing well-recognized practice of abstention[17] by the courts which was designed to accomplish

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[16] The floor discussion of the bill noted that federal district courts often conducted full hearings before a master, including "a valuation of the [utility] property," and the introduction of expert witnesses, ignoring entirely the hearings held on the same subjects before the state tribunal. 80 Cong. Rec. at 1916.

[17] Although the line of "abstention" cases did not receive this name until *Railroad Commission of Texas v. Pullman Co.*, 312

the same goal. As such, the statute codified a policy of judicial restraint as it applied to rate order cases, specifying some classes of cases, but excluding others. One of the Act's original sponsors emphasized in floor debate that access to the federal district courts would be restricted "in [the] class of cases" specified in the Act. 80 Cong. Rec. at 1918 (remarks of Sen. Norris). By implication, the other state rate order cases, *i.e.*, those involving preemption and burden on commerce, were consciously excluded from the Act's abstention policy.

As this Court noted in *Pullman*, the judge-made doctrine of abstention is "a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers." *Pullman*, 312 U.S. at 501. In the Johnson Act, however, Congress already imposed a "rigorous congressional restriction" on such powers, and in the area of state public utility rate orders, enumerated the instances where the state interest involved would require the federal court to stay its hand. No judicially-created supplement is necessary or warranted.

U.S. 496 (1941) ("*Pullman*"), the seed for its fast-growing practice was planted as early as 1908, in *Ex parte Young*, 209 U.S. 123, 166 (1908). By 1919, the federal court practice of abstaining was recognized. *See Pullman*, 312 U.S. at 501 (*citing Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)). By 1926, this practice was described as a "rule." *Massachusetts State Grange v. Benton*, 272 U.S. 525, 529 (1926).

CONCLUSION

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Petitioners,
v.
KENTUCKY PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICI CURIAE*

and

BRIEF OF EASTERN UTILITIES ASSOCIATES AND NORTHERN STATES POWER COMPANY (MINNESOTA) AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICI CURIAE*

Pursuant to Rules 29, 36 and 42 of the Rules of the United States Supreme Court, Eastern Utilities Associates ("EUA") and Northern States Power Company (Minnesota) ("NSP") respectfully move for leave to file the attached brief as *amici curiae*.[1]

REQUEST FOR LEAVE TO FILE OUT OF TIME

At the outset, EUA and NSP recognize that the deadline for making their motion expired several months ago. EUA and NSP respectfully urge that they be permitted to file the attached brief out of time and, in support, state as follows:

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[1] Petitioners consent to the filing of this brief by EUA and NSP and have filed their letter of consent with the Clerk of this Court. Respondents do not consent to the filing of this brief.

EUA is the registered utility holding company of an electric system in Massachusetts and Rhode Island. NSP owns an electric utility system serving in five states in the upper Midwest.[2] Both the EUA and NSP systems rely upon rate schedules filed at the Federal Energy Regulatory Commission ("FERC") to obtain an allocation of system power supply costs among their constituent parts and upon the "filed rate" doctrine under the Federal Power Act to achieve recognition in retail ratemaking of the FERC-filed allocation. Therefore, EUA and NSP are in a position to be substantially affected by the Court's decision in this case, which involves the question of whether Federal courts may abstain from exercising jurisdiction to ensure that the "filed rate" doctrine is observed by state commissions.

Neither EUA nor NSP was a party to the proceeding below. They recently became aware that action on the petitions for writ of certiorari was awaiting submission of the views of the Solicitor General. Considering that the submission of an *amici curiae* brief apparently would not interfere with the processing of the petitions, they promptly filed the attached brief urging grant of certiorari.

Permitting EUA and NSP to file their motions out of time will not prejudice the Court or any party. EUA and NSP do not seek a delay in the normal course of review by this Court. EUA and NSP will, if permitted to file their brief, observe any future deadlines that the Court may establish. The attached brief does not require special research or background work.

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[2] The only affiliates of EUA that are not wholly owned are four nuclear generating companies: Yankee Atomic Electric Company, Connecticut Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation and Maine Yankee Atomic Power Company. The only affiliates of NSP that are not wholly owned are Chippewa and Flambeau Improvement Company and Eloigne Company.

SPECIAL INTERESTS OF EUA AND NSP

As the attached brief demonstrates, the EUA and NSP systems have been involved in cases in which state commissions in retail ratemaking have sought to disallow costs incurred under FERC-filed rate schedules. In those cases, each system has had recourse to the courts to enforce rights under the Federal Power Act. They may have need for such recourse again.

If Federal courts are permitted to abstain from deciding issues of preemption and burden on interstate commerce, EUA and NSP will have to depend exclusively on state commissions and state courts for protection of their rights. In certain circumstances, they perceive that effective relief may be available only in the Federal courts.

EUA and NSP believe that they can provide expertise and insight as to the importance of these issues to electric utility systems which will be directly affected by the Court's decision in this case. The attached *amici curiae* brief demonstrates the significance of these issues to EUA and NSP and provides background as to why their participation in this case may be helpful in this Court's decisionmaking process.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the attached brief, EUA and NSP respectfully request that the Court grant their motion for leave to file the attached brief as *amici curiae* out of time.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*

Eastern Utilities Associates ("EUA") is the registered utility holding company of an electric system in Massachusetts and Rhode Island. In the EUA system, all generation and transmission service is rendered by a power supply subsidiary. This company sells power at wholesale to two distribution companies within the system that resell the power at retail. Each distribution company serves in a separate retail jurisdiction.

Northern States Power Company (Minnesota) ("NSP") owns an electric utility system serving in five states.

NSP directly serves in Minnesota, North Dakota and South Dakota. A wholly owned subsidiary, Northern States Power Company (Wisconsin), serves in Wisconsin and Michigan. In the NSP system, the generation and transmission facilities are owned by the company in whose service area they are located.

While the EUA and NSP systems are organized along different lines, they have this in common: they both rely upon rate schedules filed at the Federal Energy Regulatory Commission ("FERC") to obtain an allocation of system power supply costs among their constituent parts and upon the "filed rate" doctrine under the Federal Power Act to achieve recognition in retail ratemaking of the FERC-filed allocation.[1]

For both the EUA and NSP systems, the end results of the FERC-filed allocation are homogenized, or equalized, power supply costs for the constituent retail companies of the system—that is to say, identical unit costs of power supply throughout the system. For an electric system that is planned and operated as a single integrated system for the benefit of customers as a whole, there is strong engineering and economic justification for this approach.[2]

The EUA system and the NSP system each has invoked the filed rate doctrine in court to preserve equalization of power supply costs. For both systems, the litigation arose

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[1] As it applies here, the "filed rate" doctrine holds that wholesale rates filed at FERC must be given binding effect by state utility commissions in setting retail rates. *Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349, 2354 (June 17, 1986).

[2] In the EUA system, system power supply costs are equalized by having the system power supply company sell power to the two system distribution companies under a single wholesale rate. In the NSP system, power supply costs are equalized under a system interchange agreement pursuant to which the parent and its subsidiary sell power to each other at cost in such amounts that their unit costs are equalized.

from efforts to recover in retail rates the costs of abandoned nuclear construction projects. In the EUA and NSP abandonment cases at FERC, state commissions and other state agencies availed themselves of the opportunity to intervene on the merits of cost recovery. Subsequently, they collaterally challenged FERC's treatment of the cost recovery in retail proceedings. In EUA's case, a state commission declined to pass through to retail customers the abandonment costs that FERC had allowed to be collected in wholesale rates subject to investigation and refund.[3] In NSP's case, the regulatory commissions in the three states in which the parent renders service sought to avoid FERC-allowed abandonment costs of a project planned for construction by both companies in a fourth state, where the subsidiary serves.[4] On appeal of the state commission orders, the courts held in both cases that the commissions were bound to respect the FERC-filed rates.

As multi-state electric utility systems which allocate power supply costs under FERC-filed rate schedules, NSP and EUA obviously have an interest in the vitality of the "filed rate" doctrine. This Court's decision in *Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349 (June 17, 1986), confirms that the "filed rate" doctrine applies to cost allocations among affiliates under FERC-filed rate schedules. However, as the phenomenal proliferation of litigation under the doctrine in the last few years vividly demonstrates, extensive efforts are underway to avoid and circumscribe the doctrine in particular

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[3] *Eastern Edison Co. v. Department of Public Utilities*, 446 N.E.2d 684 (Mass. 1983).

[4] *Northern States Power Co. v. Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn.), *cert. denied*, 104 S.Ct. 3546 (1983); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32 (N.D. 1981). See also: *South Dakota Public Utilities Commission v. FERC*, 690 F.2d 674 (8th Cir. 1982); *State of Minnesota v. FERC*, 734 F.2d 1286 (8th Cir. 1984).

cases. From this litigation it is evident that in some cases the parties must have access to the Federal courts to enforce their rights under the Federal Power Act, if the "filed rate" doctrine is to have practical meaning. Currently, some circuits permit access as a matter of right in "filed rate" doctrine cases and others, under abstention principles, deny it. This disarray among the circuits is fueling collateral challenges to FERC's decisions and generating litigation on all sides. A national rule is urgently needed.

STATEMENT OF THE CASE

EUA and NSP adopt the Petitioner's Statement of the Case.

REASONS WHY THE COURT SHOULD GRANT THE WRIT

1. In the last several years, states have become suddenly active in efforts to have power supply costs—particularly from the more expensive sources of supply—allocated to other jurisdictions. The efforts, of course, may or may not be justified, depending on the circumstances of the particular case. But whatever the merits of the efforts, when the allocation is achieved under a rate schedule filed under the Federal Power Act, the proper forum is FERC, a neutral agency charged by Congress with deciding such issues under a standard of justness and reasonableness, specifically without preference to locality.[5]

The states' motives for attempting to keep power supply cost allocation issues away from FERC and within the affected states are, of course, understandable. As some of the recent litigation shows, allocation issues can become highly charged public and political issues in which

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[5] Section 205(b) of the Federal Power Act requires FERC to declare unlawful any "unreasonable difference" in rates "as between localities" 16 U.S.C. § 824d(b).

the interests of local jurisdictions clearly predominate over larger considerations of equity and interstate commerce. In such cases, various agencies of the state government, affected municipalities, elected officials and local industry groups join in the litigation. In effect, the jurisdiction mobilizes its resources to conduct a legal, political and publicity campaign in favor of cost avoidance. Counter-campaigns may be organized in other jurisdictions.

Whether the state courts can remain above the fray in these circumstances is at least questionable. Reading the cases, one might conclude that some state courts have done so and some have not. The Federal courts would seem to be especially suited to decide issues of this sort—resolving questions of competing state economic interests under Federal law. An abstention doctrine that allows Federal courts to avoid these cases and return them to the courts of the interested states strikes at a major purpose—perhaps the central purpose—of the Federal lower court system.

2. The deluge of "filed rate" doctrine cases is almost surely not a temporary phenomenon. It is true that the occasion for much of the recent "filed rate" litigation has been expensive construction programs that either have been abandoned before completion or brought to completion in the face of declining load growth. But in the background of this immediate development, which may abate over a period of four or five years, is a longer term development that promises not to abate but to grow steadily. This development consists of two related phenomena: (a) increased wholesale power sales as the network of extra high voltage transmission lines is built up throughout the nation and (b) the gradual introduction of increased competition into wholesale power supply markets. The first phenomenon allows utilities to sell power over wider geographic areas. The second brings into the wider wholesale power supply markets generat-

ing companies that may or may not be affiliated with traditional utilities, but whose rates, as wholesale rates, will be regulated by FERC.

Both phenomena foretell increased activity under FERC regulation. That activity will inevitably raise new legal and policy questions and pose issues of the impact in retail ratemaking of FERC's resolution of those questions. In the interest of the increasingly interstate character of power supply, access to the Federal courts should be available for the resolution of these retail rate impact issues. If the Federal courts are not available, local jurisdictions will be in a position to frustrate, in practice, decisions and policies made by FERC under the Federal Power Act and electric utility systems such as EUA and NSP will be left with unrecoverable "trapped costs."

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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